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052
No. 15682

United States
Court of Appeals
for the Ninth Circuit

CLACKAMAS MEAT CO., INC., a Corporation,
Appellant,
vs.

UNITED STATES OF AMERICA,
Appellee.

Transcript of Record

Appeal from the United States District Court for the
District of Oregon

FILED

1957

PAUL P. O'NEILL

No. 15682

United States
Court of Appeals
for the Ninth Circuit

CLACKAMAS MEAT CO., INC., a Corporation,
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[Clerk's Note: When deemed likely to be of an important nature errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

MAGUIRE, SHIELDS, MORRISON & BAILEY,
WALTER J. COSGRAVE,

723 Pittock Block,
Portland 5, Oregon,

For Appellant.

C. E. LUCKEY,
United States Attorney;

GEORGE E. JUBA,
Assistant U. S. Attorney, District of Oregon,
506 United States Courthouse,
Portland, Oregon,

For Appellee.

In the United States District Court
for the District of Oregon

Civil 8579

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CLACKAMAS MEAT CO. INC., an Oregon Corpo-
ration,

Defendant.

COMPLAINT

1. This is a civil action brought by the United States of America pursuant to Section 1345 of Title 28, USC.

2. The defendant, Clackamas Meat Company, Inc., was at all times mentioned herein, an Oregon corporation organized under the laws of the State of Oregon and doing business in the State and District of Oregon.

3. Pursuant to the first proviso of Section 2(e) of the Emergency Price Control Act of 1942, as amended (50 U.S.C. App. 902 (e)), Defense Supplies Corporation and its successor, Reconstruction Finance Corporation, conducted, at the times herein mentioned, a meat subsidy program under which certain subsidy payments were made to qualified livestock slaughterers. The basic regulations which established the terms and conditions under which such subsidy payments were to be made during the periods involved in this complaint are Reconstruc-

tion Finance Corporation's Livestock Slaughter Payments Regulation No. 3 (8 F.R. 10826), 32 C.F.R. Part 7003.1 (Supps. 1943, 1944) effective June 7, 1943, Revised Regulation No. 3 (10 F.R. 4241), 32 C.F.R. Part 7003.1 (Supp. 1945) as amended, effective January 19, 1945, and Office of Economic Stabilization Directive 41 (10 F.R. 4494), 32 C.F.R. Part 4004.1 (Supps. 1945, 1946, 1947), as amended, effective April 24, 1945.

4. As an incident of the meat subsidy program, on December 18, 1947, the Reconstruction Finance Corporation issued two orders, certified copies of which orders are annexed hereto as Exhibit A, invalidating defendant's subsidy claims in the total amount of \$16,472.81 which were paid upon preliminary approval only.

5: Section 5(d) of Regulation No. 3 (8 F.R. 10826) and Section 7003.9(d), and subsection (e) added thereto by Amendment No. 3 (10 F.R. 8073, 11153), of Revised Regulation No. 3 (10 F.R. 4241) provide that, upon a finding by the administrative agency that the claim which had been preliminarily approved was invalid, or defective, it had the right to require restitution in whole or in part. An official audit disclosed errors in claims for the monthly periods of May, 1945, through October, 1946, in the total amount of subsidy overpayments for those periods of \$16,324.91, for which a claim receivable was established on December 18, 1947.

6. Section 4 of Regulation No. 3 (8 F.R. 10826), and Section 7003.4 of Revised Regulation No. 3

(10 F.R. 4241) provide that records supporting the subsidy claims shall be preserved for inspection during the times herein stated, and that upon failure of compliance with this section the administrative agency shall have the right to invalidate the claims for the affected reporting periods. Amendment No. 9 to Supplemental Order No. 189 (20 F.R. 9460), issued jointly by the Department of Agriculture, RFC, and the Department of Commerce, effective January 1, 1956, extends the period for the preservation of records to January 1, 1957. On or before December 18, 1947, the Reconstruction Finance Corporation determined that the defendant failed to comply with the terms of this section for the monthly reporting periods of May, 1945, through October, 1946, and therefore invalidated the respective claims. The claims had previously been paid upon preliminary approval only, in the total amount of \$16,324.91 for which a claim receivable was established.

7. Announcement No. 1 under Reconstruction Finance Corporation Regulation No. 10 provided that subsidies paid upon meat held in inventory at the close of business on October 14, 1946 (termination date of price controls on meat), shall be recaptured. The defendant was paid a subsidy in the amount of \$147.90 on meat held in inventory. Pursuant to the terms of the Announcement, and in accordance with Section 7003.9(d) of Revised Regulation No. 3, on December 18, 1947, Reconstruction Finance Corporation invalidated the subsidy claims

based upon such inventories and ordered restitution thereof.

8. The plaintiff has made repeated demands upon the defendant for the payment of the claim justly due and owing the plaintiff in the sum of \$16,472.81 together with interest from the dates of payment at the rate of 4% per annum. Defendant refused and continues to refuse to pay said debt.

Wherefore, the plaintiff demands judgment in the sum of \$16,472.81 and interest from the dates of payment to the date of judgment at the rate of 4% per annum, and costs of suit.

C. E. LUCKEY,
United States Attorney,
District of Oregon;

/s/ THOMAS B. BRAND,
Assistant United States Attorney, of Attorneys for
Plaintiff.

EXHIBIT A

Reconstruction Finance Corporation
Washington

Certificate

Pursuant to the provisions of Section 1733 (b), Chapter 115, Title 28 of the United States Code, as amended,

I, M. W. Knarr, Secretary of Reconstruction Finance Corporation, a corporation created and ex-

isting pursuant to the Reconstruction Finance Corporation Act, approved January 22, 1932 (47 Stat. 5), as amended [successor to Defense Supplies Corporation, pursuant to Joint Resolution approved June 30, 1945 (59 Stat. 310)], do hereby certify that the annexed two (2) photostatic pages are true and correct copies of——

File copies of:

Letter dated December 18, 1947, from M. B. Hill, Assistant Manager, to Clackamas Meat Co., Box 44, Clackamas, Oregon; and

Letter dated December 18, 1947, from M. B. Hill, Assistant Manager, to Clackamas Meat Co., Box 44, Clackamas, Oregon;

in my custody as part of the official records of Reconstruction Finance Corporation.

In Witness Whereof, I have hereunto set my hand and caused the seal of Reconstruction Finance Corporation to be affixed at Washington, D. C., on this 17th day of November, 1954.

[Seal] /s/ M. W. KNARR,
Secretary, Reconstruction
Finance Corporation.

December 18, 1947.

Registered Mail 339403,
Return Receipt Requested.

Clackamas Meat Co.,
Box 44,
Clackamas, Oregon.

Gentlemen:

Re: Meat Subsidy Inventory
Recapture Claim Receivable.

We are herewith making formal demand for immediate payment of our past due Inventory Recapture Claim Receivable against you in the amount of \$147.90. The claim represents the amount due on Inventory Recapture computed as of October 14, 1946. You have been mailed a copy of our adjustment sheet in which we explained the charge and the reason therefor.

If this claim is paid on or before January 1, 1948, no interest will be charged. After that date, however, interest will accrue at the rate of 4% per annum.

In the event this claim is not paid within a reasonable time or satisfactory arrangements made for the payment thereof, your account will be referred to the Department of Justice for action. We regret it is necessary to so advise you.

Claim Receivable set up on regular subsidy payment is being billed separately.

Very truly yours,

/s/ M. B. HILL,

Assistant Manager.

MLLundberg:EMS

RFC—Portland.

(File Copy.)

December 18, 1947.

Registered Mail 339403,
Return Receipt Requested.

Clackamas Meat Co.,
Box 44,
Clackamas, Oregon.

Gentlemen:

Re: Meat Subsidy
Claims Receivable.

We are herewith making formal demand for immediate payment of our past due claim against you, as set out below. The claim represents the balance due as refunds of meat subsidies previously paid and later disallowed. You have been mailed copies of Adjustment Sheets in which we explained the charges and reasons therefor.

Net balance of Claim Receivable including interest of 4% per annum from dates of overpayment to November 10, 1947..\$16,324.91

Interest at 4% per annum from Nov.
11, 1947, to Dec. 31, 1947..... 84.93

\$16,409.84

If not paid by 12-27-1947, add \$1.66532 interest per day thereafter. Four days allowed for check clearance.

If the above claim is not paid within a reasonable time, or satisfactory arrangements made for the payment thereof, your account will be referred to the Department of Justice for action. We regret it is necessary to so advise you.

Claim Receivable set up on Inventory Recapture is being billed separately.

Very truly yours,

/s/ M. B. HILL,

Assistant Manager.

MLLundberg:EMS,
RFC—Portland.

(File Copy.)

[Endorsed]: Filed April 24, 1956.

[Title of District Court and Cause.]

ANSWER

Comes now the defendant and for answer to plaintiff's complaint herein denies each and every allegation, thing and matter in said complaint contained and the whole thereof, except that defendant admits that the defendant herein is an Oregon corporation, admits that during the period referred to

in plaintiff's complaint that the Defense Supplies Corporation and its successor, Reconstruction Finance Corporation, conducted a meat subsidy program under the provisions of the regulations referred to in plaintiff's complaint, and admits that defendant was paid a subsidy in the amount of \$147.90, which was thereafter properly invalidated.

For a First, Further and Separate Answer and Defense, Defendant Alleges as Follows:

I.

Following the issuance of the purported orders of December 18, 1947, defendant duly protested said purported orders.

II.

There has been no determination of defendant's protests, as required by law.

the administrative remedies, now available to it.

defendant Alleges as Follows:

I.

In computing the amounts to which defendant was entitled as meat subsidy payments under the transactions on which plaintiff's claim is based, the Reconstruction Finance Corporation erroneously computed the value of all cattle slaughtered by defendant at the feeder subsidy rate, whereas said value should have been computed on the slaughtered live weights of feeder and non-feeder cattle as reported to the Reconstruction Finance Corporation by defendant.

For a Third Separate Answer and Defense, and Set-off, Defendant Alleges as follows:

I.

Plaintiff is indebted to defendant in the amount of \$16,324.91 for meat subsidy payments unlawfully withheld from defendant.

For a Fourth Further and Separate Answer and Defense and Counterclaim, Defendant Alleges as Follows:

I.

Plaintiff is indebted to defendant in the amount of \$16,324.91 for meat subsidy payments unlawfully withheld from defendant.

Wherefore, having fully answered, defendant prays that plaintiff take nothing by its complaint, and that defendant have judgment against the plaintiff in the sum of \$10,000.00.

/s/ WALTER J. COSGRAVE,
Attorney for Defendant.

H. KENT HOLMAN,
MAGUIRE, SHIELDS,
MORRISON & BAILEY,
Of Counsel.

Affidavit of Service by Mail attached.

[Endorsed]: Filed August 13, 1956.

[Title of District Court and Cause.]

REPLY

Comes now the plaintiff, United States of America, and for reply to defendant's answer, admits, denies and alleges as follows:

I.

With regard to defendant's first, further and separate answer and defense, plaintiff denies each and every matter, allegation and thing therein contained.

II.

With regard to defendant's second, separate answer and defense, plaintiff denies that the computation of defendant's meat subsidy payments by the Reconstruction Finance Corporation was erroneous, and reasserts the propriety of such computation as alleged in plaintiff's complaint.

III.

With regard to defendant's third, separate answer and defense and set-off plaintiff denies each and every matter, allegation and thing therein contained.

IV.

With regard to defendant's fourth, further and separate answer and defense and counterclaim, plaintiff denies each and every matter, allegation and thing therein contained.

Wherefore, having fully replied to defendant's answer, plaintiff prays that defendant take nothing

thereby and prays further for judgment, as set forth in plaintiff's complaint.

C. E. LUCKEY,

United States Attorney,

District of Oregon;

/s/ THOMAS B. BRAND,

Assistant U. S. Attorney.

Affidavit of Service by Mail attached.

[Endorsed]: Filed October 1, 1956.

[Title of District Court and Cause.]

MOTION TO STAY PROCEEDINGS

Comes now the Plaintiff, United States of America, appearing by and through C. E. Luckey, United States Attorney for the District of Oregon, and Thomas B. Brand, Assistant United States Attorney, and respectfully moves the Court for an Order to stay proceedings in the above-entitled matter, pending the outcome of an administrative appeal heretofore granted the Defendant, Clackamas Meat Co., Inc., by the Reconstruction Finance Corporation.

C. E. LUCKEY,

United States Attorney,

District of Oregon;

/s/ THOMAS B. BRAND,

Assistant United States

Attorney.

Affidavit of Service by Mail attached.

[Endorsed]: Filed March 25, 1957.

[Title of District Court and Cause.]

MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR STAY OF PROCEEDINGS

Plaintiff respectfully submits to the Court that Plaintiff's motion for Stay of Proceedings should be granted in order to enable Defendant to exhaust the administrative remedies, now available to it.

Defendant desires a factual determination of the issues involved herein, which cannot be granted in this Court. *Yakus v. U.S.* 321 U.S. 414; *U.S. v. Luer Packing Co.*, 110 F Supp. 792; *Riverview Packing Co. v. RFC*, 207 F 2nd 361; *U.S. v. Bass*, 215 F 2nd 9; *U.S. v. Trenton Packing Co.*, 133 F. Supp. 69.

Defendant being a dissolved corporation, pursuant to proclamation of the Governor on December 30, 1955, it is submitted that the matter should be stayed in this Court rather than dismissed in order to avoid the possibility that the time for filing suit against it as a dissolved corporation might run, under O.R.S. 57.630, before the defendants administrative remedies are exhausted, and to avoid the further necessity of plaintiff having to institute a new civil action against Defendant in the event that Defendants protest and appeal is denied, with the requisite further expenditure of time, inconvenience and expense, as well as having to meet the possible defense of *res judicata*.

The propriety of such a stay in the District Court pending administrative action and appeal to the Emergency Court of Appeals has been upheld in the cases of *Reconstruction Finance Corp. v. Service Pipeline Co.*, 198 F. 2nd 775; *U.S. v. Bass*, 215 F 2nd 9; *U.S. v. Baellow*, No. 9067, Western District of Missouri, October, 1955, a copy of the Court's memorandum order being attached hereto.

Respectfully submitted,

C. E. LUCKY,

United States Attorney,
District of Oregon;

/s/ THOMAS B. BRAND,

Assistant United States At-
torney.

(Copy.)

In the District Court of the United States for the
Western District of Missouri Western Division

No. 9067

UNITED STATES OF AMERICA,

Plaintiff,

vs.

M. E. BAELLOW,

Defendant.

MEMORANDUM AND ORDER

Having now considered defendant's motion to stay proceedings herein, and his brief in support

thereof, and plaintiff's brief in opposition thereto, I believe that the motion should be sustained, and that further proceedings in this action should be stayed for such time as will allow defendant a reasonable opportunity to exhaust his administrative remedies, already begun, of protesting to Reconstruction Finance Corporation the claimed findings of wilful violation of War Food orders 75 and 75.2, and, if timely pursued but unsuccessful, any available appellate remedy that he may wish, or be advised to pursue, and It Is So Ordered, but if such remedy or remedies be not diligently prosecuted, or be abandoned, or be diligently prosecuted to final conclusion but terminate adversely to defendant, the Court will, upon motion and such showing, terminate this stay.

Done, this 19th day of October, 1955.

/s/ CHARLES E. WHITTAKER,
District Judge.

Kansas City, Missouri.

[Endorsed]: Filed March 25, 1957.

[Title of District Court and Cause.]

AFFIDAVIT IN SUPPORT OF PLAINTIFF'S
MOTION FOR STAY OF PROCEEDINGS

State of Oregon,

County of Multnomah—ss.

I, Thomas B. Brand, Assistant United States Attorney for the District of Oregon, being first duly sworn, depose and say:

That I am one of attorneys for Plaintiff, United States of America, in the above-entitled action, and that I make this affidavit in support of plaintiff's motion for a stay of proceedings, during the pendency of an appeal by Defendant to the Reconstruction Finance Corporation relating to the alleged orders attached to Plaintiff's complaint herein, and during the pendency of an appeal to the United States Emergency Court of Appeals from any adverse ruling of the Reconstruction Finance Corporation.

It appears from the files and pleadings herein, and more particularly, from Defendants Response to Plaintiff's Request for Admissions No. 11, that Defendant did make an administrative protest following receipt of the letters of December 18, 1947, copies of which are attached to Plaintiff's complaint.

I am informed and therefore believe and declare herein, that Defendant desires to further perfect

its administrative appeal, demand a complete administrative hearing, and exercise its statutory right to a hearing before the United States Emergency Court of Appeals, if deemed appropriate, all pursuant to USC Tit. 50 App., Sec. 924.

C. E. LUCKY,
United States Attorney
District of Oregon;

/s/ THOMAS B. BRAND,
Assistant United States At-
torney.

Subscribed and sworn to before me this 25th day
of March, 1957.

[Seal] /s/ V. E. HARR,
Notary Public for Oregon.

My Commission Expires: 2/18/61.

[Endorsed]: Filed March 25, 1957.

[Title of District Court and Cause.]

MOTION FOR SUMMARY JUDGMENT

Comes now the plaintiff, United States of America, by C. E. Lucky, United States Attorney for the District of Oregon, and Thomas B. Brand, Assistant United States Attorney, and pursuant to the provisions of Rule 56 of the Federal Rules of Civil Procedure, and based upon the pleadings and ex-

hibits herein, plaintiff's Request for Admission of Facts and authenticity of documents, and defendant's response thereto, and the Affidavit attached hereto, plaintiff respectfully moves the Court for summary judgment, as prayed for in plaintiff's complaint.

C. E. LUCKY,

United States Attorney

District of Oregon;

/s/ THOMAS B. BRAND,

Assistant United States Attorney.

[Title of District Court and Cause.]

AFFIDAVIT

State of Oregon,

County of Multnomah—ss.

I, Thomas B. Brand, Assistant United States Attorney for the District of Oregon, being first duly sworn, depose and say:

That I am one of the attorneys for plaintiff, United States of America, in the above-entitled action; that I make this affidavit in support of plaintiff's Motion for Summary Judgment, attached hereto.

At a hearing before The Honorable Gus J. Solomon, Judge of the above-entitled court, this matter

came on for hearing upon plaintiff's Motion to Stay Proceedings, pending the outcome of an appeal to the Reconstruction Finance Corporation, which the defendant, Clackamas Meat Co., Inc., proposed to institute. It was at that time ordered by the Court that the trial herein set for April 29, 1957, should be stricken if, prior to the 29th day of April, 1957, the Clackamas Meat Co., Inc., instituted an appeal with the Reconstruction Finance Corporation.

I am informed by letter from the United States Department of Justice, dated May 6, 1957, and therefore believe and declare herein, that the Reconstruction Finance Corporation received no protest nor appeal from the defendant, Clackamas Meat Co., Inc., as of the 2nd day of May, 1957.

/s/ THOMAS B. BRAND.

Subscribed and sworn to before me this 27th day of May, 1957.

[Seal] /s/ V. E. HARR,
Notary Public for Oregon.

My Commission Expires: 2/18/61.

[Endorsed]: Filed May 27, 1957.

In the United States District Court
for the District of Oregon

Civil No. 8579

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CLACKAMAS MEAT CO., INC., an Oregon Corporation,

Defendant.

JUDGMENT ORDER

Based upon plaintiff's motion for summary judgment and the record herein

It Is Hereby Ordered and Adjudged that plaintiff have judgment against the defendant, Clackamas Meat Co., Inc., an Oregon corporation, in the sum of Twenty-two Thousand Seven Hundred and 80/100 Dollars (\$22,780.80) and that no costs be allowed to either party.

Made and entered this 10th day of June, 1957.

/s/ GUS J. SOLOMON,
District Judge.

Affidavit of service by mail attached.

[Endorsed]: Filed June 11, 1957.

[Title of District Court and Cause.]

MOTION

Comes now the defendant and moves the Court for an order setting aside the judgment order heretofore entered in favor of plaintiff and against defendant, on the 10th day of June, 1957, upon plaintiff's motion for summary judgment on the basis of the affidavit of defendant's attorney attached hereto.

MAGUIRE, SHIELDS, MOR-
RISON & BAILEY,
Attorneys for Defendant.

State of Oregon,
County of Multnomah—ss.

This is to certify that the foregoing Motion is made in good faith, not for the purpose of delay, and that in my opinion the same is well founded in law.

/s/ W. J. COSGRAVE,
Of Attorneys for Defendant.

[Title of District Court and Cause.]

AFFIDAVIT

State of Oregon,
County of Multnomah—ss.

I, Walter J. Cosgrave, being first duly sworn, depose and say that I am the attorney for the defend-

ant in the above-entitled action and that I make this affidavit in support of the defendant's motion for an order setting aside the judgment heretofore entered herein.

That I am now advised by the United States Attorney's Office that the United States intends to proceed against Mr. John Parker, a former stockholder of the defendant corporation, and that it is necessary in the interest of justice that the said John Parker be permitted to pursue in behalf of the defendant corporation such defenses and setoffs as are available to said corporation.

/s/ W. J. COSGRAVE.

Subscribed and sworn to before me this 20th day of June, 1957.

[Seal] /s/ ADA HEREFORD,
Notary Public for Oregon.

My Commission Expires: 5/23/61.

Affidavit of Service by mail attached.

[Endorsed]: Filed June 21, 1957.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Clackamas Meat Company, Inc., the defendant above-named, hereby appeals to the United States Court of Appeals for the

Ninth Circuit from the judgment entered herein on the 10th day of June, 1957, and from the whole thereof.

/s/ WALTER J. COSGRAVE,
Attorney for Appellant.

Of Counsel:

MAGUIRE, SHIELDS, MORRI-
SON & BAILEY.

[Endorsed]: Filed July 10, 1957.

[Title of District Court and Cause.]

COST BOND ON APPEAL

Whereas, in the District Court of the United States for the District of Oregon, in the above-entitled cause, a judgment was rendered against the above-named defendant and in favor of the above-named plaintiff, and said defendant has filed Notice of Appeal from said judgment,

Now, Therefore, the undersigned Clackamas Meat Company, Inc., principal, and American Automobile Insurance Company, a corporation of the State of Missouri, qualified to do and transact a general surety business within the State of Oregon, as surety, are held and firmly bound unto the United States of America in the full sum of Two Hundred Fifty Dollars (\$250.00). The condition of said bond is that the undersigned shall pay all costs if the appeal is dismissed or the judgment affirmed, or such costs as the Appellate Court may award if the

judgment is modified, to the extent of this undertaking.

Sealed with our seals and dated this 10th day of July, 1957.

[Seal]

AMERICAN AUTOMOBILE IN-
SURANCE COMPANY,
Surety;

By /s/ WILLIAM H. EAGLETON,
Its Attorney in Fact.

Countersigned:

/s/ C. P. MAAS,
Agent.

CLACKAMAS MEAT COM-
PANY, INC.,
Principal;

By /s/ WALTER J. COSGRAVE,
Its Attorney.

[Endorsed]: Filed July 10, 1957.

[Title of District Court and Cause.]

STATEMENT OF POINTS

Comes now the defendant-appellant, and files this, its Statement of Points, on which defendant-appellant intends to rely on appeal of this cause, to wit:

1. The trial court erred in entering summary judgment for plaintiff based upon the pleadings and the record herein.

Respectfully submitted this 22 day of July, 1957.

/s/ WALTER J. COSGRAVE,
Attorney for Defendant-
Appellant.

Service of copy acknowledged.

[Endorsed]: Filed July 22, 1957.

[Title of District Court and Cause.]

DOCKET ENTRIES

1956

Apr. 24—Filed complaint.

Apr. 25—Issued summons to marshal.

May 7—Filed corp. commissioner's return of service on deft. Clackamas Meat Co., Inc.

May 17—Filed Summons with Marshal's return.

May 21—Filed & Entered stipulation allowing defts. to June 16 to answer.

May 21—Filed & Entered Order allowing defts. to June 16 to answer.

May 29—Filed plaintiff's request for admission of facts and authenticity of documents.

June 21—Filed stipulation.

June 21—Filed Motion.

June 21—Filed & Entered Order extending time to answer to and including July 21, 1956.

July 20—Filed stipulation & motion for order allowing deft. to & including Aug. 10, 1956, to answer, etc.

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July 20—Filed & entered Order allowing deflt. to & inc. Aug. 10, 1956, to answer, etc.

Aug. 13—Filed Answer to plaintiff's request for admissions.

Aug. 13—Filed Answer.

Aug. 20—Entered Order setting for Pretrial Conf. on Oct. 15, 1956.

Oct. 1—Filed reply.

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Mar. 11—Entered order setting for P. T. C. on April 8, 1957.

Mar. 25—Filed motion of pltf. to stay proceedings.

Mar. 25—Filed affidavit in support of pltf's. motion to stay proceedings.

Mar. 25—Filed memorandum in support of pltf's. motion to stay proceedings.

Apr. 8—Entered order denying pltf's. motion to stay proceedings.

Apr. 8—Record of Pretrial Conference.

Apr. 8—Entered order setting for trial April 16, 1957.

Apr. 16—Entered order striking trial date of April 16, 1957, and resetting to April 29, 1957, with condition that case may be referred to the Reconstruction Finance Committee before April 29, 1957, by the parties and that the trial date of April 29, 1957, be stricken if the case is referred; with further order that if parties desire a trial after consideration by R.F.C. that said request be made by June 10, 1957.

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May 27—Filed affidavit.

May 27—Filed Motion for Summary Judg.

June 10—Record of hearing on pltf's. motion for summary judgment.

June 10—Entered Order allowing plft's. Motion for Summary Judgment.

June 11—Filed Judgment in favor of pltf. in sum of \$22,780.80.

June 21—Filed deft's. Motion to set aside judgment entered 6/10/57.

June 26—Filed praecipe U.S. for certified copy transcript judgment dkt. Issued 6/27/57.

July 2—Entered Order re-setting hearing on deft's. Motion to set aside judgment to July 5, 1957.

July 5—Entered Order denying deft's. Motion to set aside judgment 6-10.

July 10—Filed notice of appeal by defendant.

July 10—Filed cost bond on appeal.

July 22—Filed designation of record on appeal.

July 22—Filed statement of points.

Aug. 1—Filed Transcript of proceedings of June 10, 1957.

Aug. 1—Filed Appellees Designation of Record on Appeal.

Aug. 1—Filed Transcript of proceedings of April 16, 1957.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
District of Oregon—ss.

I, R. DeMott, Clerk of the United States District Court for the District of Oregon, do hereby certify that the foregoing documents consisting of Complaint; Corporation Commissioner's return of service; Stipulation re extension of time to file answer; Order extending time for defendant to answer; Plaintiff's request for admission of facts and authenticity of documents; Stipulation re extension of time to answer complaint and plaintiff's request for admission of facts, etc.; Motion for extension of time to answer complaint and plaintiff's request for admission of facts, etc.; Order granting extension of time in which to answer complaint and plaintiff's request for admission of facts, etc.; Stipulation re extension of time to answer complaint and plaintiff's request for admission of facts, etc.; Motion for extension of time to answer complaint and plaintiff's request for admission of facts, etc.; Order granting extension of time in which to answer complaint and plaintiff's request for admission of facts, etc.; Answer; Answer to plaintiff's request for admissions; Reply; Plaintiff's motion to stay proceedings; Memorandum in support of plaintiff's motion for stay of proceedings; Affidavit in support of plaintiff's motion for stay of proceedings; Blotter entry re trial date; Plaintiff's motion for summary judgment; Blotter entry on order allowing plaintiff's motion for summary judgment.

ment; Judgment order; Defendant's motion for order to set aside judgment; Notice of appeal; Cost bond on appeal; Statement of points; Designation of record on appeal; Appellee's designation of record on appeal; and Transcript of docket entries, constitute the record on appeal from a judgment of said court in a cause therein numbered Civil 8579, in which Clackamas Meat Co., Inc., an Oregon corporation, is the defendant and appellant and United States of America is the plaintiff and appellee; that the said record has been prepared by me in accordance with the designations of contents of record on appeal filed by the appellant and appellee, and in accordance with the rules of this court.

I further certify that there is enclosed herewith the reporter's transcript of proceedings of April 16 and June 10, 1957.

I further certify that the cost of filing the notice of appeal, \$5.00, has been paid by the appellant.

In Testimony Whereof I have hereunto set my hand and affixed the seal of said court in Portland, in said District, this 12th day of August, 1957.

[Seal] R. DeMOTT,
Clerk;

By /s/ THORA LUND,
Deputy.

[Endorsed]: No. 15682. United States Court of Appeals for the Ninth Circuit. Clackamas Meat Co., Inc., a Corporation, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Oregon.

Filed August 13, 1957.

Docketed August 23, 1957.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

**In the United States Court of Appeals
for the Ninth Circuit**

**CLACKAMAS MEAT COMPANY, INC., an Oregon
Corporation, APPELLANT**

v.

UNITED STATES OF AMERICA, APPELLEE

**On Appeal from the United States District Court
for the District of Oregon**

BRIEF FOR THE UNITED STATES

GEORGE COCHRAN DOUB,
Assistant Attorney General,

C. E. LUCKEY,
United States Attorney,

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FILED

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**In the United States Court of Appeals
for the Ninth Circuit**

No. 15682

**CLACKAMAS MEAT COMPANY, INC., an Oregon
Corporation, APPELLANT**

v.

UNITED STATES OF AMERICA, APPELLEE

**On Appeal from the United States District Court
for the District of Oregon**

BRIEF FOR THE UNITED STATES

This action was brought by the United States to recapture meat subsidy payments which were made to appellant in 1945 and 1946 under a meat subsidy program conducted in accordance with the first proviso of Section 2(e) of the Emergency Price Control Act of 1942, as amended (50 U.S.C. App. 902(e)). The payments, made on preliminary approval of appellant's subsidy claims, were subsequently invalidated by the Reconstruction Finance Corporation (RFC)

(R. 4-10).¹ The district court entered judgment for the United States on June 10, 1957 on the basis of appellee's motion for summary judgment and the record (R. 22). On July 5, 1957 the court entered an order denying appellant's motion to set aside the judgment (R. 29), and on July 10, 1957 appellant filed a notice of appeal from the judgment entered on June 10, 1957 (R. 24-25).

The jurisdiction of the district court rested upon 28 U.S.C. 1345. This Court's jurisdiction rests upon 28 U.S.C. 1291.

STATEMENT OF THE CASE

The statutory background.—Section 2(e) of the Emergency Price Control Act of 1942, 56 Stat. 24, 50 U.S.C. App. (1946 Ed.) 902, authorized the Federal Loan Administrator to pay subsidies in such amounts and upon such terms and conditions as the Administrator, with the approval of the President, should determine to be necessary to obtain the required production of commodities previously determined by the President to be strategic or critical. The Section further provided that these subsidies were to be paid by corporations created and organized pursuant to Section 5(d) of the Reconstruction Finance Corporation Act, 48 Stat. 1108, as amended, 15 U.S.C. 606(b) (3). Meat having been defined by the President as a "strategic or critical material", Section 2(e) thus had the

¹ References to the Transcript of Record printed on the appeal will be designated "R. —". References to appellant's brief will be designated "Br. —".

effect of empowering the Federal Loan Administrator, with the approval of the President, to make the determination of the need for subsidy payments to producers of this commodity. Under the Stabilization Act of 1942, 56 Stat. 756, as amended, 50 U.S.C. App. (1946 Ed.) 961, *et seq.*, as supplemented by Executive Order 9250 (7 F.R. 7871), the Director of Economic Stabilization was given overriding policy authority over all price and stabilization agencies. In carrying out this authority, the Director on May 7, 1943, ordered the Federal Loan Administrator to initiate the Livestock Slaughter Subsidy Program. On the same day, the Federal Loan Administrator (who was also Secretary of Commerce), directed the President of the Defense Supplies Corporation, a corporation created pursuant to Section 5(d) of the Reconstruction Finance Corporation Act, to pay subsidies to livestock slaughterers, packers, and wholesalers. This directive was implemented by the issuance of Defense Supplies Corporation Regulation No. 3, which became effective June 7, 1943 (8 F.R. 10826), and which was reissued as Revised Regulation No. 3, effective January 19, 1945 (10 F.R. 4241). By Joint Resolution of June 30, 1945 (59 Stat. 310), Congress dissolved Defense Supplies Corporation and transferred its subsidy administration functions to Reconstruction Finance Corporation.

The large number of monthly subsidy claims (estimated to have been approximately 26,000) rendered it administratively impossible to make a rapid determination as to the accuracy or validity of each sub-

mitted claim. On the other hand, the prompt payment of claims was necessary in order to enable the slaughterers to continue operation. Accordingly, slaughterers were permitted to certify that their claims were accurate and that they had not wilfully violated any regulation of the Office of Price Administration or the War Food Administration during the monthly reporting period covered by the claims. The latter certification was required because, the subsidy program being an adjunct of price and distribution controls, compliance with the regulations of related agencies was a condition precedent to entitlement to subsidy payments. Defense Supplies Corporation was authorized to pay, upon preliminary approval, duly certified subsidy claims.² The applicable regulations gave the administrative agency the right, however, upon a finding that claims preliminarily approved were invalid or defective, to withhold or invalidate payments and to require restitution in whole or in part of any payments made thereon.³

The facts of this case.—Appellant, a meat slaughterer doing business in Clackamas, Oregon, made claim for and received meat subsidies under this program (R. 4-5, 10-11). After payment on the basis

² D.S.C. Regulation No. 3, effective June 7, 1943, Section 5(d) (8 F.R. 10827); Revised Regulation No. 3, effective January 19, 1945, Section 7003.9(c) (10 F.R. 4243).

³ D.S.C. Regulation No. 3, effective June 7, 1943, Section 5(d) (8 F.R. 10826); Revised Regulation No. 3, effective January 19, 1945, Section 7003.9(d) (10 F.R. 4241), and Section 7003.9(e), added by Amendment No. 3, effective May 5, 1945 (10 F.R. 8073, 11153).

of preliminary approval of the claims, an official audit disclosed errors in the claims for the monthly periods of May, 1945 through October, 1946, as well as a failure to comply with administrative regulations requiring preservation of records supporting subsidy claims. An administrative finding that the claims in question were invalid or defective was thereupon entered and, in accordance with the applicable regulations, the claims were invalidated (R. 4-5). The Reconstruction Finance Corporation issued two letter orders dated December 18, 1947, invalidating the claims and establishing claims receivable in the total amount of \$16,472.81 ⁴ (R. 8-10).

The complaint in this action (R. 3-10) was filed in the district court on April 24, 1956. After setting forth the foregoing facts, the complaint alleged that the Government had made repeated demands upon appellant for the payment of the claims, together with interest, but that appellant had refused and continued to refuse to pay them (R. 6). Judgment was demanded in the amount of \$16,472.81, with interest and costs (R. 6). On May 29, 1956, the Government filed a request for admission of facts and authen-

⁴ One of these orders (R. 8-9) established a claim receivable in the amount of \$147.90, representing the amount of subsidies which had been paid upon meat which remained in appellant's inventory at the termination date of the subsidy program. Since appellant's answer (R. 11) admitted that its claims had been "properly invalidated" in this amount, and since appellant apparently stands ready to repay this amount, only the order set forth at R. 9-10 is involved on this appeal.

ticity of documents (see R. 27).⁵ Paragraph 11 requested that appellant admit that, after receipt of the letters of December 18, 1947, it had made no further protest to any federal agency with respect to these orders, or that if any protest had been made it had been administratively denied (App. B, *infra*, p. 25). Appellant filed both its Answer and its Answer to Plaintiff's Request for Admissions on August 13, 1956 (R. 10-12, 28). The Answer alleged, *inter alia*, that appellant had duly protested the orders and that no determination of the protests had been made (R. 11). Paragraph 11 of the request for admissions was denied (App. B, *infra*, p. 26).

The Government's Reply, filed on October 1, 1956, denied generally the allegations that a protest had been filed and not determined (R. 13-14). Subsequently, however, the Government filed a Motion to Stay Proceedings in order to enable appellant to exhaust its administrative remedies (R. 14-19). In

⁵ Pertinent portions of the request for admissions, of appellant's answer to this request, and of the transcripts of the proceedings at the hearings in the court below are printed in Appendix B to this brief, *infra*, pp. 25-29, pursuant to the authorization of the Clerk of this Court. The omission of these documents from the printed Transcript of Record was due to appellant's failure to serve upon Government counsel a designation of the record for printing as required by Rule 17(6) of the Rules of this Court. As a result, the record was printed with no opportunity for Government counsel to designate those portions of the record which it wished to have printed. The material printed in the Transcript corresponds to that designated by appellant in the district court to go forward to this Court on the appeal. In the district court, the Government counter-designated the entire record to be forwarded.

an affidavit in support of this motion, the Assistant United States Attorney in charge of the case stated that, in view of appellant's allegations respecting the filing of a protest, it appeared that appellant had in fact protested the orders in question (R. 18). The Assistant United States Attorney further stated that "I am informed and therefore believe and declare herein, that Defendant desires to further perfect its administrative appeal, demand a complete administrative hearing, and exercise its statutory right to a hearing before the United States Emergency Court of Appeals, if deemed appropriate, all pursuant to USC Tit. 50 App., Sec. 924" (R. 18-19). The Motion was also accompanied by a Memorandum citing authority for the propriety of entering such a stay in the circumstances of the case (R. 15-17).

On April 8, 1957 the district court denied the Motion for Stay and set the case down for trial on April 16, 1957 (R. 28). When the case was called on that date, Mr. Cosgrave, counsel for appellant, informed the court that he was not ready for trial, and that he had no witnesses present (App. B, *infra*, pp. 26-27). The Assistant United States Attorney informed the court that the Government had no witnesses but was ready to proceed. Mr. Cosgrave thereupon stated that "I think, Your Honor, that actually the case goes on a matter of law * * *" (App. B, *infra*, p. 27). The court then entered an order resetting the trial date to April 29, 1957, with the condition that the case might be referred to RFC by the parties before that date, and that the trial date of April 29, 1957 would be stricken if the case were so referred, further

ordering that if the parties desired a trial, after consideration by RFC, that the request for such a trial be made by June 10, 1957 ⁶ (R. 28).

On May 27, 1957 the Government filed a Motion for Summary Judgment, accompanied by the affidavit of the Assistant United States Attorney (R. 19-21). The affidavit noted that the court had ordered that the trial set for April 29, 1957 should be stricken if appellant "instituted an appeal with the Reconstruction Finance Corporation" prior to that date, and that he had been informed that RFC had received no protest or appeal from appellant as of May 2, 1957 (R. 20-21). Appellant apparently filed no response to this motion before the motion came on for hearing on June 10, 1957 (see R. 29). At that time Mr. Cosgrave again assured the court that "* * * it is purely, Your Honor, a legal question" (App. B, *infra*, p. 28). The following colloquy ensued (App. B. *infra*, pp. 28-29) :

THE COURT: I thought you were going to ask the administrative body to make a determination of this case?

MR. COSGRAVE: Your Honor, I took that up with my client.

THE COURT: You never asked them?

⁶ We are informed by the United States Attorney that this order was never reduced to writing, other than as it appears in the minute entry of April 16, 1957, printed in the Transcript of Record at p. 28. Although the colloquy between the court and counsel which was the basis of the order noted on the minutes took place on April 16, 1957, the date of the proceedings transcribed *infra*, at pp. 26-27, there was no reporter present when the order was orally rendered.

MR. COSGRAVE: No, Sir; no, Sir.

THE COURT: The plaintiff may have motion for summary judgment. * * *

The court accordingly entered a Judgment Order on June 10, 1957, giving the Government judgment against appellant in the sum of \$22,780.80 (R. 22). After appellant's motion to set aside the judgment was denied (R. 23, 29), appellant filed notice of appeal on July 10, 1957 (R. 24-25).

STATUTES AND REGULATIONS INVOLVED

The applicable statutes and regulations are set forth in pertinent part in Appendix A, *infra*, pp. 21-24.

SUMMARY OF ARGUMENT

Appellant urges as the single ground for reversal of the judgment below that summary judgment was precluded because there was an unresolved dispute between appellant and the Government as to a material issue of fact, namely, whether appellant had earlier protested the RFC order of December 18, 1947. Any such contention in this Court is foreclosed by the assurances of counsel for appellant, made to the court below on two separate occasions, that only legal and not factual issues were involved in this case. Moreover, the record plainly reveals that the Government's acquiescence in appellant's insistence that it had mailed a protest to RFC eliminated the earlier dispute upon which appellant now relies. It was this acquiescence which prompted the Government's motion to stay the district court proceedings in order

that an administrative determination of the protest might be made. Appellant, however, failed to take advantage of the opportunity afforded it by the district court to submit its documented objections to the administrative agency. As a result, the Government became entitled to judgment as a matter of law, since the then-final administrative order of December 18, 1947, which was not subject to invalidation by the district court, created a valid debt enforceable by summary judgment proceedings.

ARGUMENT

The District Court Properly Entered Summary Judgment for the United States

A. There Was No Genuine Issue of Material Fact raised in this Case.

On this appeal, appellant contends that the order of the district court granting summary judgment for the Government is in error and must be reversed. One ground for reversal, and one ground only, is urged upon this Court: that the court below erred because “[t]here was a material fact question at issue before the court which could not be resolved by summary judgment” (Br. 6). “Upon a motion for summary judgment”, says appellant, “it is no part of the court’s function to decide issues of fact, *but solely to determine whether there is an issue of fact to be tried*” (Br. 10; emphasis added).

When the Government filed its Motion for Summary Judgment, counsel for appellant did not file a response to the motion urging that there was a ma-

terial issue of fact to be tried. Indeed, no written response was filed at all (see R. 27-29). When the motion for summary judgment came on for hearing, and the court below was faced with the question of whether factual issues were involved, counsel for appellant likewise did not urge that there was a material issue of fact to be tried. Quite the contrary. Counsel for appellant at that time informed the court—in clear, unmistakable language, and for the second time—that “*it is purely, Your Honor, a legal question*” (App. B, *infra*, p. 28; emphasis added). At the earlier hearing, counsel for appellant had used somewhat different phraseology: “*I think, Your Honor, that actually the case goes on a matter of law * * **” (App. B, *infra*, p. 27; emphasis added).

The court below took counsel for appellant at his word. This reliance upon counsel’s assurance, appellant now says—through the same counsel—was reversible error which this Court is obliged to correct. We submit that such an argument affronts the intelligence of both this Court and the court below.

Nevertheless, since counsel for appellant now insists that he was mistaken in the court below and thereby led the district court into error, it is incumbent upon us to demonstrate that he was in fact correct in agreeing with the Government that no genuine issue of material fact was involved. The “disputed question of fact” which appellant now seeks to raise is as to whether or not appellant had protested the RFC orders of December 18, 1947 (Br. 6, 11, 12). In other words, appellant contends that, at the time the order appealed from was entered, the

United States was disputing appellant's allegation, contained in its Answer, that it had theretofore duly protested the administrative orders in question. It is abundantly clear from the record of the course of the proceedings below, however, that the Government did not dispute the genuineness of this allegation. Indeed, the Government's acceptance of its genuineness was the very basis of the Government's Motion to Stay Proceedings.

It is apparent from the allegations of the complaint that, at the time it was filed, the Government's files contained no record of any protest having ever been filed by appellant (R. 3-10). Appellant, however, alleged in its Answer and in its response to the Request for Admissions that it had in fact protested the orders in question (R. 11; App. B, *infra*, pp. 25-26). The Government, in turn, still having no record of the filing of the alleged protest, filed a Reply denying appellant's allegations relating to the protest (R. 13-14).

On further consideration, however, the Government revised its position, since it was apparent that an impasse had been reached. Obviously, the fact that the Government's files did not contain the alleged protest was not proof that no protest had been sent, nor was the fact that appellant had forwarded a protest, if true, proof that the protest had been received by RFC. In view of the seeming equities in favor of appellant in this situation, the Government decided to accept as true appellant's contention that it had in fact forwarded a protest, and recommended

a procedure whereby appellant could have all the advantages—in the form of administrative and, if necessary, Emergency Court consideration of its protest—which would have accrued to it had the protest to the 1947 order in fact been timely received. This procedure was set forth in the Government's Motion to Stay Proceedings (R. 14), designed to suspend the district court action while appellant presented its case on the merits of the order to RFC, the only forum authorized by law to make an initial determination of a challenge to an order such as the one here involved. The sole basis for this Motion was the concession that appellant had in fact made a bona fide effort to protest the 1947 orders. A Memorandum in support of the Motion cited authorities for entering a stay in analogous circumstances, including an order entered by Judge (now Mr. Justice) Whitaker, in an almost identical case (R. 15-17).

In further support of this Motion, the Assistant United States Attorney in charge of the case filed an affidavit which made the Government's position in the matter crystal clear. He there stated (R. 18; emphasis added) :

It appears from the files and pleadings herein, and more particularly, from Defendants Response to Plaintiff's Request for Admissions No. 11, *that Defendant did make an administrative protest following receipt of the letters of December 18, 1947 * * **

Yet appellant seeks to obtain a reversal on the ground that the Government persisted in its contention that appellant did *not* "make an administrative protest

following receipt of the letters of December 18, 1947 * * *”.

In the end, appellant itself acknowledges that it does not believe in its own argument to the effect that there was a continuing dispute between appellant and the Government as to whether or not appellant had forwarded a protest. At page 14 of its brief, appellant states (emphasis added) :

The appellant alleged, *and it appears that the Government almost concedes* (R. 18), that the appellant duly filed protests against 1947 orders.

The record reference is to the language in the affidavit of the Assistant United States Attorney just quoted. In view of the unequivocal nature of that language, the use of the word “almost” to modify “concedes” in appellant’s statement is surely misplaced, and cannot serve to veil the fact that no dispute existed.

Appellant seeks to extricate itself from the position in which the words of its own counsel and the plain import of the record places it by claiming, apparently, that the Government’s motion for stay was spurious, being designed “to force appellant to appeal when it had nothing from which to appeal * * *” (Br. 13; see also Br. 14). Appellant points to the statute⁷ and notes that it “required the Administrator, in the event he denied such a protest as appellant alleges it filed, to inform the protestant of the grounds upon which such decision was based * * *. It was from

⁷ Section 203(a) of the Emergency Price Control Act of 1942, 56 Stat. 31, as amended, 58 Stat. 638, 50 U.S.C. App. 923.

such a decision that appellant would have had a right of appeal" (Br. 13-14). Appellant's clear implication is that the Government intended to "force" appellant to appeal from an administrative denial of its protest when no such administrative denial had ever been made.

But the record cannot possibly be read in this fashion. The only appeal from an administrative denial of a protest is to the Emergency Court of Appeals;⁸ there is no such thing as a further appeal within the administrative agency. Had the Government intended that appellant be "forced" to appeal from a non-existent denial of its protest, it would have moved for a stay to permit appellant to go directly to the Emergency Court. Instead, it moved for a stay "pending the outcome of an *administrative* appeal" (R. 14; emphasis added). The Memorandum in support of the motion stated that the "motion should be granted to enable Defendant to exhaust the *administrative* remedies, now available to it" (R. 15; emphasis added). The affidavit of the Assistant United States Attorney, after referring to "an appeal by Defendant to the Reconstruction Finance Corporation" stated as follows (R. 18-19; emphasis added):

I am informed and therefore believe and declare herein, that Defendant desires to further perfect its *administrative* appeal, demand a com-

⁸ Section 204(a) of the Act provides that "Any person who is aggrieved by the denial or partial denial of his protest may, within thirty days after such denial, file a complaint with the Emergency Court of Appeals, * * * specifying his objections * * *". See App. A, *infra*, p. 22.

plete *administrative* hearing, and exercise its statutory right to a hearing before the United States Emergency Court of Appeals, if deemed appropriate * * *.

Apparently no objection to this statement was ever lodged by appellant.

What is immediately apparent from the foregoing is that when the Government's motion papers referred to an "administrative appeal" (see R. 14, 18, 19, 21), the reference was to the protest proceedings themselves, which constitute the statutory method of taking an administrative appeal from an adverse administrative order.⁹ What is further apparent is that in entering its order of April 16, 1957, the district court intended to give appellant the time necessary to lodge with RFC the protest which had previously miscarried, and to file such supporting documents and arguments as it might see fit, in order that an administrative determination of the protest, objecting to the merits of the 1947 order, might be made.

Appellant never took advantage of the opportunity thus afforded it. Accordingly, the Government filed its motion for summary judgment on May 27, 1957, accompanied by an affidavit stating that RFC had "received no protest nor appeal from the defendant

⁹ Section 203(a) of the Act provides that "At any time after the issuance of any * * * order under section 2, * * * any person subject to such * * * order may * * * file a protest specifically setting forth objections to any such provision * * *". See App. A, *infra*, pp. 21-22.

* * * as of the 2nd day of May, 1957”¹⁰ (R. 21). At the hearing on this motion, Judge Solomon stated to counsel for appellant that he “thought you were going to ask the administrative body to make a determination of this case”, and counsel for appellant conceded that he had never done so (App. B, *infra*, pp. 28-29). The court thereupon immediately granted summary judgment for the Government.

It may be that appellant is arguing that it was, and still is, under the impression that, under the order of April 16, 1957, it was RFC and not appellant which was expected to take the first step toward the administrative determination of the protest which had never in fact reached RFC.¹¹ If that were appellant’s understanding, it would surely have been disabused of this misconception by the Government’s Motion to Dismiss and the accompanying affidavit (R. 19-21). Appellant could then have attempted to convey this misunderstanding, if it existed, to the court below in a written response, but it failed to do so. At the hear-

¹⁰ The affidavit noted that the Government’s Motion to Stay Proceedings sought a stay “pending the outcome of an appeal to the Reconstruction Finance Corporation, which the defendant, Clackamas Meat Co., Inc., proposed to institute”. It further noted that the order of April 16, 1957 had provided that the resetting of the trial “should be stricken if, prior to the 29th day of April, 1957, the Clackamas Meat Co., Inc., instituted an appeal with the Reconstruction Finance Corporation” (R. 21).

¹¹ It will be noted that the original concession by the Government that appellant “did make an administrative protest” was based upon the allegations of appellant, and not upon any information within the actual knowledge of the Government in general or RFC in particular (R. 18).

ing, Judge Solomon clearly expressed his understanding that it was appellant who was to be the moving party in the administrative proceedings, and the reply of counsel for appellant to the court's questioning did not contradict this.

In view of the foregoing, we see absolutely no merit in the single point relied upon by appellant on this appeal: that there was an unresolved issue of fact which precluded summary judgment.

*B. The United States was Entitled to Judgment
as a Matter of Law.*

Although appellant does not make the further contention that, even if there were no issue of fact here, the Government would not be entitled to judgment as a matter of law, a brief summary of the law supporting the judgment below may prove helpful to the court. Since counsel for appellant are counsel for appellee in *United States v. Frank L. Smith*, No. 15505 in this Court, set for argument on January 17, 1957, we shall incorporate by reference much of the authority cited in the Government's brief in that case in order to avoid unnecessary repetition here.¹²

In its brief in the *Smith* case, the Government points out that Section 204(d) of the Emergency Price Control Act of 1942 (App. A, *infra*, pp. 22-23) vests in the Emergency Court of Appeals exclusive jurisdiction to determine the validity of any order issued under Section 2 of the Act, and precludes any other court from exercising such jurisdiction. Section

¹² The brief will be cited as "*Smith Br. —*".

203 of the Act (App. A, *infra*, pp. 21-22) provides the sole existing avenue of review of such orders: the filing of a protest with the issuing agency.¹³ If the protest is denied, further review may be sought in the Emergency Court of Appeals (*Smith* Br. 8-9). Orders invalidating meat subsidy claims, such as the order of December 18, 1947, are orders "issued under Section 2" within the meaning of these protest and exclusive review provisions (*Smith* Br. 9-10). As a result, the district court was obliged to consider the order of December 18, 1947 as conclusively establishing a valid debt, judicially enforceable by way of summary judgment proceedings, absent a subsequent nullification of the order by the administrative agency or the Emergency Court, or the pendency of administrative or Emergency Court proceedings seeking such nullification.

When it became apparent in the court below that appellant had in fact earlier attempted to lodge a protest with RFC, the court, at the Government's urging, quite properly gave appellant an opportunity, subject to time limitations, to go before the administrative agency in order to perfect its previously-aborted attempt at protest. Had appellant taken advantage of this opportunity, the Government would have lost its entitlement to summary judgment, at least for so long as appellant diligently prosecuted its administrative and, if necessary, its Emergency Court remedies.

¹³ See *Smith* Br. 9, note 5, for a discussion of a second avenue of review available prior to 1947.

But appellant chose to ignore the proffered means of further staving off the summary judgment from which it now appeals. Appellant has never yet explained its inaction in this regard. The only reasonable inference is that appellant in fact had no real grounds for seeking the administrative reversal of the order in question. In these circumstances, appellant has no standing to contend that the Government was not entitled to judgment as a matter of law or to object to the action of the district court in entering summary judgment. .

CONCLUSION

For the foregoing reasons, we respectfully submit that the judgment of the court below should be affirmed.

GEORGE COCHRAN DOUB,
Assistant Attorney General,

C. E. LUCKEY,
United States Attorney,

SAMUEL D. SLADE,
B. JENKINS MIDDLETON,
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Washington 25, D. C.

December 1957

APPENDIX A

1. The pertinent provisions of the Emergency Price Control Act of 1942, 56 Stat. 23, as amended, 50 U.S.C. App. (1946 Ed.) 901, *et seq.* are as follows:

Section 2 [50 U.S.C. App. 902]

* * * *

(e) Whenever the Administrator determines that the maximum necessary production of any commodity is not being obtained or may not be obtained during the ensuing year, he may, on behalf of the United States, without regard to the provisions of law requiring competitive bidding, buy or sell at public or private sale, or store or use, such commodity in such quantities and in such manner and upon such terms and conditions as he determines to be necessary to obtain the maximum necessary production thereof or otherwise to supply the demand therefor, or make subsidy payments to domestic producers of such commodity in such amounts and in such manner and upon such terms and conditions as he determines to be necessary to obtain the maximum necessary production thereof: *Provided*, That in the case of any commodity which has heretofore or may hereafter be defined as a strategic or critical material by the President pursuant to section 5d of the Reconstruction Finance Corporation Act, as amended, such determinations shall be made by the Federal Loan Administrator with the approval of the President, and, notwithstanding any other provision of this Act or of any existing law, such commodity may be bought or sold, or stored or used, and such subsidy payments to domestic producers thereof may be paid, only by corporations created or organized pursuant to such section 5d: * * *

Section 203 [50 U.S.C. App. 923]

(a) At any time after the issuance of any regulation or order under section 2, or in the

case of a price schedule, at any time after the effective date thereof specified in section 206, any person subject to any provision of such regulation, order, or price schedule may, in accordance with regulations to be prescribed by the Administrator, file a protest specifically setting forth objections to any such provision and affidavits or other written evidence in support of such objections. * * *

Section 204 [50 U.S.C. App. 924]

(a) Any person who is aggrieved by the denial or partial denial of his protest may, within thirty days after such denial, file a complaint with the Emergency Court of Appeals, created pursuant to subsection (c), specifying his objections and praying that the regulation, order, or price schedule protested be enjoined or set aside in whole or in part. * * * Upon the filing of such complaint the court shall have exclusive jurisdiction to set aside such regulation, order, or price schedule, in whole or in part, to dismiss the complaint, or to remand the proceeding. * * *

* * * *

(d) * * * The Emergency Court of Appeals, and the Supreme Court upon review of judgments and orders of the Emergency Court of Appeals, shall have exclusive jurisdiction to determine the validity of any regulation or order issued under section 2, of any price schedule effective in accordance with the provisions of section 206, and of any provision of any such regulation, order, or price schedule. Except as provided in this section, no court, Federal, State, or Territorial, shall have jurisdiction or power to consider the validity of any such regulation, order, or price schedule, or to stay, restrain, enjoin, or set aside, in whole or in part, any provision of this Act authorizing the issuance of such regulations or orders, or making effective any such price schedule, or any provision of any such regulation, or-

der, or price schedule or to restrain or enjoin the enforcement of any such provision.

(e) * * *

(2) In any proceedings brought pursuant to section 205 of this Act * * * or section 37 of the Criminal Code, involving an alleged violation of any provision of any such regulation, order or price schedule, the court shall stay the proceeding—

* * * *

(ii) during the pendency of any protest properly filed by the defendant under section 203 * * * prior to the institution of the proceeding under section 205 of this Act * * * or section 37 of the Criminal Code, setting forth objections to the validity of such provision which the court finds to have been made in good faith; and

(iii) during the pendency of any judicial proceeding instituted by the defendant under this section with respect to such protest or instituted by the defendant under paragraph (1) of this subsection with respect to such provision, and until the expiration of the time allowed in this section for the taking of further proceedings with respect thereto.

Notwithstanding the provisions of this paragraph, stays shall be granted thereunder in civil proceedings only after judgment and upon application made within five days after judgment.

* * *

2. Defense Supplies Corporation Revised Regulation No. 3, effective January 19, 1945 (10 F.R. 4243), as amended by Amendment No. 3, effective May 5, 1945 (10 F.R. 8073 and 11153), provides in pertinent part as follows:

Section 7003.9(c). *Frequency.* Payments will be made monthly upon preliminary approval of the claim.

(d) *Terms.* Preliminary approval and payment of claims shall not constitute final accept-

ance of the validity or amount of the claim. On a finding that the claim is invalid or defective, Defense Supplies Corporation shall have the right to require restitution of any payment or any part thereof. Any sums found to be due to Defense Supplies Corporation shall be deductible against any accrued or subsequent claim for any payment by Defense Supplies Corporation to the person.

Section 7003.10(a). *Compliance with Other Regulations.* Defense Supplies Corporation shall declare invalid, in whole or in part, any claim by an applicant who, in the judgment of the War Food Administrator or the Price Administrator, has wilfully violated any regulation or order of their respective agencies applicable to the purchase or sale of livestock or to livestock slaughter or to the sale or distribution of meat, and any claim of any applicant who the Price Administrator certifies to Defense Supplies Corporation has been determined in a civil proceeding to have violated a substantive provision of any regulation or order of the Office of Price Administration applicable to the purchase or sale of livestock or to livestock slaughter or to the sale or distribution of meat.

APPENDIX B

[Title of District Court and Cause]

PLAINTIFF'S REQUEST FOR ADMISSION OF FACTS
AND AUTHENTICITY OF DOCUMENTS

Comes now the plaintiff, appearing by and through C. E. Luckey, United States Attorney for the District of Oregon, and Thomas B. Brand, Assistant United States Attorney, and pursuant to the provisions of Rules 36 and 37(c) of the Federal Rules of Civil Procedure, hereby requests admission by the defendant of the following facts, within 21 days after service upon it of this request:

* * * *

11. That the said Clackamas Meat Co., Inc. did not, after receipt of the letters of December 18, 1947, make any further protest to the Office of Defense Supplies, to the Reconstruction Finance Corporation or to any other federal agent in regard to the matters contained therein, or that if any protest was made by Clackamas Meat Co., Inc., the protest was administratively denied.

* * * *

[Filed May 29, 1956]

[Title of District Court and Cause]

ANSWER TO PLAINTIFF'S REQUEST FOR
ADMISSIONS

Comes now the defendant and for answer to plaintiff's request for admissions herein states as follows:

* * * *

11. Denied.

* * * *

[Filed August 13, 1956]

[Title of District Court and Cause]

Portland, Oregon
April 16, 1957

BEFORE:

The Honorable Gus J. Solomon, District Judge.

APPEARANCES:

Mr. Thomas B. Brand, Assistant United States Attorney, appearing in behalf of the United States of America;

Mr. Walter J. Cosgrave, of Attorneys for Defendant.

COURT REPORTER:

Gordon R. Griffiths.

TRANSCRIPT OF PROCEEDINGS

THE COURT: Are you ready, Mr. Cosgrave?

MR. COSGRAVE: No, Your Honor, I am not.

THE COURT: You are the one that wanted to go to trial.

MR. COSGRAVE: That is correct, Your Honor. When I received the card, Your Honor, that it was set for the sixteenth, I then attempted to contact the Court and to find out which case was going to take precedence. I have just learned this morning that apparently your Clerk did call my office and Mr. Goodwin's office and advised us that the case of Burow v. Holman was going over until two o'clock, but neither one of us got the word. We actually came here this morning with our clients, prepared for a jury case.

THE COURT: Where are your witnesses in the Clackamas Meat Company case?

MR. COSGRAVE: They are not here. As a matter of fact, Your Honor, I wrote my client, who is the only individual involved, at Prineville, and told him that the case would be heard sometime this week, and it was my assumption that it would be heard after this Burow v. Holman case was disposed of.

THE COURT: I do not see how you got that assumption. You called my office to find out, and we called back and told you this morning it was going to be the first one.

MR. COSGRAVE: Your Honor, I am sorry. The Clerk says that he called the office. It is apparent that he did, but I didn't get the word.

THE COURT: Have you got your witnesses here? (To Mr. Brand.)

MR. BRAND: I have no witnesses, Your Honor, but the government is ready to proceed at any time.

MR. COSGRAVE: I think, Your Honor, that actually the case goes on a matter of law, and it is my thinking—

THE COURT: Set it over until Friday. Take it up Friday morning at ten o'clock.

MR. COSGRAVE: Thank you, Your Honor, and I apologize to the Court, and I wish the Court to know that it was inadvertent. We came with the understanding that this case was set for ten this morning.
(Hearing concluded.)

Certified to be a true and accurate transcript of all proceedings had in said cause at the said time and place.

GORDON R. GRIFFITHS
Court Reporter

[Filed August 1, 1957]

[Title of District Court and Cause]

Portland, Oregon
Monday, June 10, 1957

BEFORE:

The Honorable Gus J. Solomon, District Judge.

APPEARANCES:

Mr. Edward J. Georgeff, Assistant United States Attorney, appearing in behalf of the United States of America;

Mr. Walter J. Cosgrave, of Attorneys for Defendant.

COURT REPORTER:

Gordon R. Griffiths.

TRANSCRIPT OF PROCEEDINGS

THE COURT: What happened in that case?

MR. COSGRAVE: Your Honor, I contacted my people. Apparently there was nothing in the corporation to allow them to go forward. I talked to the man who is the principal stockholder in it. It will be our position—I pointed out to the Court that on the status of the record the government does not make a case against the defendant and could not make a case because the matter actually—the petition to the R.F.C. which was originally made has never been acted upon. I think the Court indicated a contrary feeling with respect to that, but I believe it is purely, Your Honor, a legal question.

THE COURT: I thought you were going to ask the administrative body to make a determination of this case?

MR. COSGRAVE: Your Honor, I took that up with my client.

THE COURT: You never asked them?

MR. COSGRAVE: No, Sir; no, Sir.

THE COURT: The plaintiff may have motion for summary judgment. Summary judgment may be entered against defendant.

MR. COSGRAVE: Thank you.

(Hearing concluded.)

Certified to be a true and correct transcript of all proceedings had at said time and place in said cause.

GORDON R. GRIFFITHS
Court Reporter

[Filed August 1, 1957]

No. 15682

United States
Court of Appeals
For the Ninth Circuit

CLACKAMAS MEAT CO., INC., a corporation,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Appellant's Brief

Appeal from the United States District Court
for the District of Oregon

MAGUIRE, SHIELDS, MORRISON & BAILEY,
WALTER J. COSGRAVE,
H. KENT HOLMAN,
Attorneys for Appellant.

FILED

DEC 9 1957

PAUL P. O'BRIEN, CLERK

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United States
Court of Appeals
For the Ninth Circuit

CLACKAMAS MEAT CO., INC., a corporation,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Appellant's Brief

Appeal from the United States District Court
for the District of Oregon

STATEMENT OF THE CASE

This action was brought by the United States to recover a portion of meat subsidy payments made to appellant during a period from May, 1945, through October, 1946. These subsidy payments were subject to recapture should it be determined later that appellant had violated any regulation of the Reconstruction Finance Corporation pertaining to livestock slaughter payments.

Appellant, a meat slaughterer doing business in Clackamas, Oregon, received subsidies to alleviate the price squeeze upon slaughterers caused by uncontrolled live cattle prices and controlled prices on meat.

These subsidies were paid under the following statutory and regulatory authority: Section 2(e) of the Emergency Price Control Act of 1942, 56 Stat. 24, 50 U.S.C. App. (1946 Ed.) 902, authorized the Federal Loan Administrator to pay subsidies in such amounts and upon such terms and conditions as the Administrator, with the approval of the President, should determine to be necessary to obtain the required production of commodities previously determined by the President to be strategic or critical. Section 2(e) of the Act above further provided that the subsidies should be paid by corporations created and organized pursuant to Section 5(d) of the Reconstruction Finance Corporation Act, 48 Stat. 1108, as amended, 15 U.S.C. 606 (b) (3). Meat was defined by the President as a "strategic or critical material"; that has the effect of empowering the Federal Loan Administrator under Section 2(e), with the approval of the President, to make a determination of the need for subsidy payments to producers of meat. Under the Stabilization Act of 1942, 56 Stat. 756, as amended, 60 U.S.C. App. (1946 Ed.) 961, et seq., as supplemented by Executive Order 9250 (7 F.R. 7871), the Director of Economic Sta-

bilization was given overriding policy authority over all price and stabilization agencies. In carrying out this authority, the Director on May 7, 1943, ordered the Federal Loan Administrator to initiate the Live-stock Slaughter Subsidy Program. On the same day, the Federal Loan Administrator (who was also Secretary of Commerce), directed the President of the Defense Supplies Corporation, a corporation created pursuant to Section 5(d) of the Reconstruction Finance Corporation Act, to pay subsidies to live-stock slaughterers, packers, and wholesalers. This directive was implemented by the issuance of Defense Supplies Corporation Regulation No. 3, which became effective June 7, 1943 (8 F.R. 10826), and which was reissued as Revised Regulation No. 3, effective January 19, 1945 (10 F.R. 4241). Office of Economic Stabilization Directive 41 (10 F.R. 4494), as amended, effective April 24, 1945, also established the terms and conditions under which subsidy payments were made. By Joint Resolution of June 30, 1945 (59 Stat. 310), Congress dissolved Defense Supplies Corporation and transferred its subsidy administration functions to Reconstruction Finance Corporation.

Section 5(d) of Regulation No. 3 (8 F.R. 10826) and Section 7003.9(d) and subsection (e) added thereto by Amendment No. 3 (10 F.R. 8073, 11153), of Revised Regulation No. 3 (10 F.R. 4241) provide that, upon a finding by the administrative agency

that the claim which had been preliminarily approved was invalid, or defective, it had the right to require restitution in whole or in part.

Facts of This Case.—In October of 1946, certain of appellant's books and records were investigated by a man purporting to represent the Portland Loan Agency of the Reconstruction Finance Corporation, and based on this investigation the RFC issued two letter orders dated December 18, 1947. One letter order was a demand for payment of an Inventory Recapture Claim Réceivable in the amount of \$147.90 (R. 8-9)¹. The other letter order was a demand in the amount of \$16,409.84 for refund of meat subsidies previously paid and now disallowed (R. 9-10).

The Government filed the present complaint on April 24, 1956, to reclaim the subsidy payments disallowed by the RFC (R. 3-6). Appellant filed its answer on August 13, 1956 (R. 10-12); admitting that it owed the Inventory Recapture Claim Receivable in the amount of \$147.90; denying that it had failed to preserve records supporting subsidy claims, and alleging as its First, Further and Separate Answer and Defense that appellant had protested the orders of December 18, 1947, issued by RFC, and that there has been no determination of appellant's protests, as required by law. On October 1, 1956,

1. References to the Transcript of Record printed on the appeal will be designated "R. ____".

the Government filed a reply denying each and every allegation contained in appellant's answer (R. 13-14). On March 25, 1947, the Government filed, together with a memorandum and affidavit, a Motion To Stay Proceedings "pending the outcome of an administrative appeal heretofore granted appellant by RFC" (R. 14-19). Although it does not appear in the Transcript of Record, the Affidavit of Thomas B. Brand, Assistant United States Attorney for the District of Oregon, indicates that the District Court granted the Government's Motion To Stay Proceedings (R. 20-21). On May 27, 1957, the Government filed a Motion for Summary Judgment supported by Affidavit of Thomas B. Brand (R. 19-20). The District Court granted the Government's Motion for Summary Judgment, and on June 10, 1957, entered a Judgment Order thereon in favor of the Government (R. 22). On June 20, 1957, Appellant moved for an order setting aside the judgment (R. 23-24). Appellant's motion was denied, and on July 10, 1957, appellant filed Notice of Appeal together with Cost Bond on Appeal.

STATUTES INVOLVED

The applicable statutes are set forth in pertinent part in the Appendix, *infra*, pp. 15-16.

SPECIFICATION OF ERROR

1. In this action by the Government to recover meat subsidy payments determined to be due it by

orders of the Reconstruction Finance Corporation, the District Court erred in entering summary judgment in favor of the Government.

SUMMARY OF ARGUMENT

The District Court improperly granted appellee's motion for summary judgment and improperly entered judgment for appellee.

There was a material fact question at issue before the court which could not be resolved by summary judgment.

Appellant alleged in its answer that it had protested the RFC's letter orders of December 18, 1947 (R. 11). Appellee, in its reply, denied this (R. 13). A material question of fact was put in issue by the pleadings. On plaintiff's motion for summary judgment, allegations of the answer must be taken as true, and unless it appears with absolute certainty that defendant is not entitled to relief upon any theory, the request for summary judgment should be denied.

The matter in issue is material because a protest of the letter orders of December 18, 1947, would still be before the RFC², and the District Court would have no jurisdiction to hear the case. Once the court has determined there is a material question of fact

2. RFC was dissolved, effective at the close of June 30, 1957, and its functions in connection with the matters at issue were transferred to the Administrator of the General Services Administration, pursuant to the provisions of Reorganization Plan No. 1 of 1957, July 2, 1957, 22 F.R. 462.

at issue between the parties, it has determined that entry of summary judgment is not proper. The District Court had no authority under its summary judgment powers to resolve this material question of fact in favor of plaintiff and award judgment.

The case should be reversed and remanded with instructions to grant a trial so that the material question of fact at issue may be determined.

ARGUMENT

Appellee Was Not Entitled to a Summary Judgment Because There Was a Genuine Issue in This Case as to a Material Fact.

A. For Appellee to Be Entitled to a Summary Judgment, There Must Not Be a Genuine Issue as to Any Material Fact and Appellee Must Be Entitled to a Judgment as a Matter of Law.

Appellee moved for summary judgment under Rule 56 of the Federal Rules of Civil Procedure, Title 28, U.S.C.A. The pertinent subsections of Rule 56 are as follows:

“SUMMARY JUDGMENT RULE 56(a) FOR CLAIMANT.

A party seeking to recover upon a claim, counterclaim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof. As

amended December 27, 1946, effective March 19, 1948.

56(c) MOTION AND PROCEEDINGS THEREON.

The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages. As amended December 27, 1946, effective March 19, 1948."

A reading of Rule 56(c) indicates that it must be shown that there is no genuine issue as to any material fact *and* that the moving party is entitled to a judgment as a matter of law. Quoting from "Notes of Advisory Committee on Rules" which follows Rule 56 in Title 28, U.S.C.A.:

"Summary judgment procedure is a method for promptly disposing of actions in which there is no genuine issue as to any material fact."

The procedure for summary judgment is intended to expedite settlement of litigation where it affir-

matively appears upon the record that in the last analysis there is only a question of law as to whether a party should have judgment in accordance with the motion for summary judgment, and, if there is any question of fact presented on the record in the proceedings for summary judgment, the motion cannot be sustained. *Burley v. Elgin, J. & E. Ry. Co.*, 140 F. (2d) 488 (C.A.7), affirmed 65 Sup. Ct. 1282, 325 U.S. 711, 89 L. Ed. 1886, opinion adhered to 66 Sup. Ct. 721, 327 U.S. 661, 90 L. Ed. 928.

Rule 56 concerning summary judgment was not intended to deprive litigants of a right to a full hearing on the merits if any issue of fact exists and was not intended to be used as a substitute for a regular trial where the outcome of the litigation depends upon disputed questions of fact. *Michel v. Meier*, 8 F.R.D. 464 (D.C. Pa.); *Chappel v. Goltsman*, 185 F. (2d) 215 (C.A. 5); *Dulansky v. Iowa Illinois Gas & Electric Co.*, 191 F. (2d) 881 (C.A. 8); *Chemical Foundation v. Universal-Cyclops Steel Corporation*, 2 F.R.D. 283 (D.C. Pa.).

The trial judge should be slow in passing upon a motion for summary judgment which would deprive a party of a right to trial by jury where there is reasonable indication that a material fact is in dispute. *Aetna Insurance Company v. Cooper Wells & Company*, 234 F. (2d) 342 (C.A. 6).

Summary judgment may not be granted under Rule 56 if there be an issue presented as to the

existence of any material fact, and all doubts as to the existence of a genuine issue as to a material fact must be resolved against the party moving for summary judgment. *Sarnoff v. Ciaglia*, 165 F. (2d) 167 (C.A. 3); *Eastern Brass & Copper Co. v. General Electric Supply Corp.*, 101 F. Supp. 410 (D.C. N.Y.); *American Optical Co. v. New Jersey Optical Co.*, 58 F. Supp. 601 (D.C. Mass.).

Upon a motion for summary judgment it is no part of the court's function to decide issues of fact, but solely to determine whether there is an issue of fact to be tried. *Toebelman v. Missouri-Kansas Pipe Line Co.*, 130 F. (2d) 1016 (C.A. 3).

United Meat Co., Inc. v. Reconstruction Finance Corporation, and *Federated Meat Corporation v. Reconstruction Finance Corporation*, 174 F. (2d) 528 (C.A. D.C.), are companion cases in which two meat slaughterers sued the RFC for subsidy payments withheld. The RFC, in its answer, alleged that the plaintiffs had violated substantive provisions of the Office of Price Administration; the plaintiffs, in their replies, denied that they had violated O.P.A. regulations and also asserted that the court had no jurisdiction to make a determination. The court held that there was a genuine issue of fact and summary judgment was denied.

B. There Was a Genuine Issue Raised in This Case as to a Material Fact.

Appellant, as a part of its answer, alleged in its First, Further and Separate Answer and Defense (R. 11), as follows:

"I.

Following the issuance of the purported orders of December 18, 1947, defendant duly protested said purported orders.

II.

There has been no determination of defendant's protests, as required by law."

Appellant's affirmative defense quoted above was denied by appellee in its reply as follows:

"I.

With regard to defendant's First, Further and Separate Answer and Defense, plaintiff denies each and every matter, allegation and thing therein contained." (R. 13).

The above excerpts from the pleadings clearly raised a genuine issue as to a material fact. This issue has never been properly disposed of and should be tried before a jury. Appellant alleged that it had protested the letter orders of RFC dated December 18, 1947. Appellee denied that the orders had been protested. This was a genuine issue as to a material fact.

The fact at issue was material because if appellant has in fact protested the letter orders of RFC, and RFC has made no determination of appellant's protests, as required by law, then the protests are still before RFC and the District Court has no jurisdiction to hear appellee's claims.

Section 203(a) of the Emergency Price Control Act of 1942 (56 Stat. 31) (58 Stat. 638) (50 U.S.C. App. 923) is as follows:

“Sec. 203(a) At any time after the issuance of any regulation or order under section 2, or in the case of a price schedule, at any time after the effective date thereof specified in section 206, any person subject to any provision of such regulation, order, or price schedule may, in accordance with regulations to be prescribed by the Administrator, file a protest specifically setting forth objections to any such provision and affidavits or other written evidence in support of such objections. Statements in support of any such regulation, order, or price schedule may be received and incorporated in the transcript of the proceedings at such times and in accordance with such regulations as may be prescribed by the Administrator. Within a reasonable time after the filing of any protest under this subsection, but in no event more than thirty days after such filing, the Administrator shall either grant or deny such protest in whole or in part, notice such protest for hearing, or provide an opportunity to present further evi-

dence in connection therewith. In the event that the Administrator denies any such protest in whole or in part, he shall inform the protestant of the grounds upon which such decision is based, and of any economic data and other facts of which the Administrator has taken official notice."

It is appellant's defense, raised by its First, Further and Separate Answer and Defense, that pursuant to Section 203(a) of the Act above appellant filed protests to the orders of the RFC and that the Administrator of the RFC has failed to make determination of appellant's protests as required by Section 203(a) of the Act. The protests are still pending before RFC; therefore the District Court has no jurisdiction to hear appellee's claims. It is a complete defense to the Government's action.

What the Government sought, on belatedly realizing that it could not prove an essential element of its case, and could not disprove a fact which constituted a defense, was to force the appellant to appeal when it had nothing from which to appeal, and require appellant to undertake to disprove that it owed the moneys which the Government claimed.

The applicable statute (§203(a) of the Emergency Price Control Act of 1942), (56 Stat. 31), (58 Stat. 638), 50 U.S.C. App. 923) required the Administrator, in the event he denied such a protest as appellant alleges that it filed, to inform the protestant of the

grounds upon which such decision was based, and of any economic data and other facts of which the Administrator had taken official notice. It was from such a decision that appellant would have had a right of appeal.

The appellant alleged, and it appears that the Government almost concedes (R. 18), that the appellant duly filed protests against 1947 orders. In 1957, the Government sought to force appellant to prosecute an appeal with respect to such protests, when the decision required by the Statute had never been rendered.

CONCLUSION

Appellant respectfully submits that the judgment order should be reversed.

Respectfully submitted,

MAGUIRE, SHIELDS, MORRISON
& BAILEY,

WALTER J. COSGRAVE,

H. KENT HOLMAN,

Attorneys for Appellant.

APPENDIX

Rule 56 of the Federal Rules of Civil Procedure,
Title 28 U.S.C.A.:

“SUMMARY JUDGMENT RULE 56(a) FOR CLAIMANT.

A party seeking to recover upon a claim, counterclaim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof. As amended December 27, 1946, effective March 19, 1948.

56(c) MOTION AND PROCEEDINGS THEREON.

The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages. As amended December 27, 1946, effective March 19, 1948.”

Section 203(a) of the Emergency Price Control Act of 1942 (56 Stat. 31) (58 Stat. 638) (50 U.S.C. App. 923) is as follows:

“Sec. 203(a) At any time after the issuance of any regulation or order under section 2, or in the case of a price schedule, at any time after the effective date thereof specified in section 206, any person subject to any provision of such regulation, order, or price schedule may, in accordance with regulations to be prescribed by the Administrator, file a protest specifically setting forth objections to any such provision and affidavits or other written evidence in support of such objections. Statements in support of any such regulation, order, or price schedule may be received and incorporated in the transcript of the proceedings at such times and in accordance with such regulations as may be prescribed by the Administrator. Within a reasonable time after the filing of any protest under this subsection, but in no event more than thirty days after such filing, the Administrator shall either grant or deny such protest in whole or in part, notice such protest for hearing, or provide an opportunity to present further evidence in connection therewith. In the event that the Administrator denies any such protest in whole or in part, he shall inform the protestant of the grounds upon which such decision is based, and of any economic data and other facts of which the Administrator has taken official notice.”

No. 15690

United States
Court of Appeals
for the Ninth Circuit

SUNSET-STERNAU FOOD CO., a corporation,
Appellant,

vs.

AMERICAN ALMOND PRODUCTS, CO., INC.,
a corporation, Appellee.

Transcript of Record

Appeal from the United States District Court for the
Northern District of California,
Southern Division

FILED

JAN 7 1955

PAUL F. GIBSON, CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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RAYMOND J. O'CONNOR,

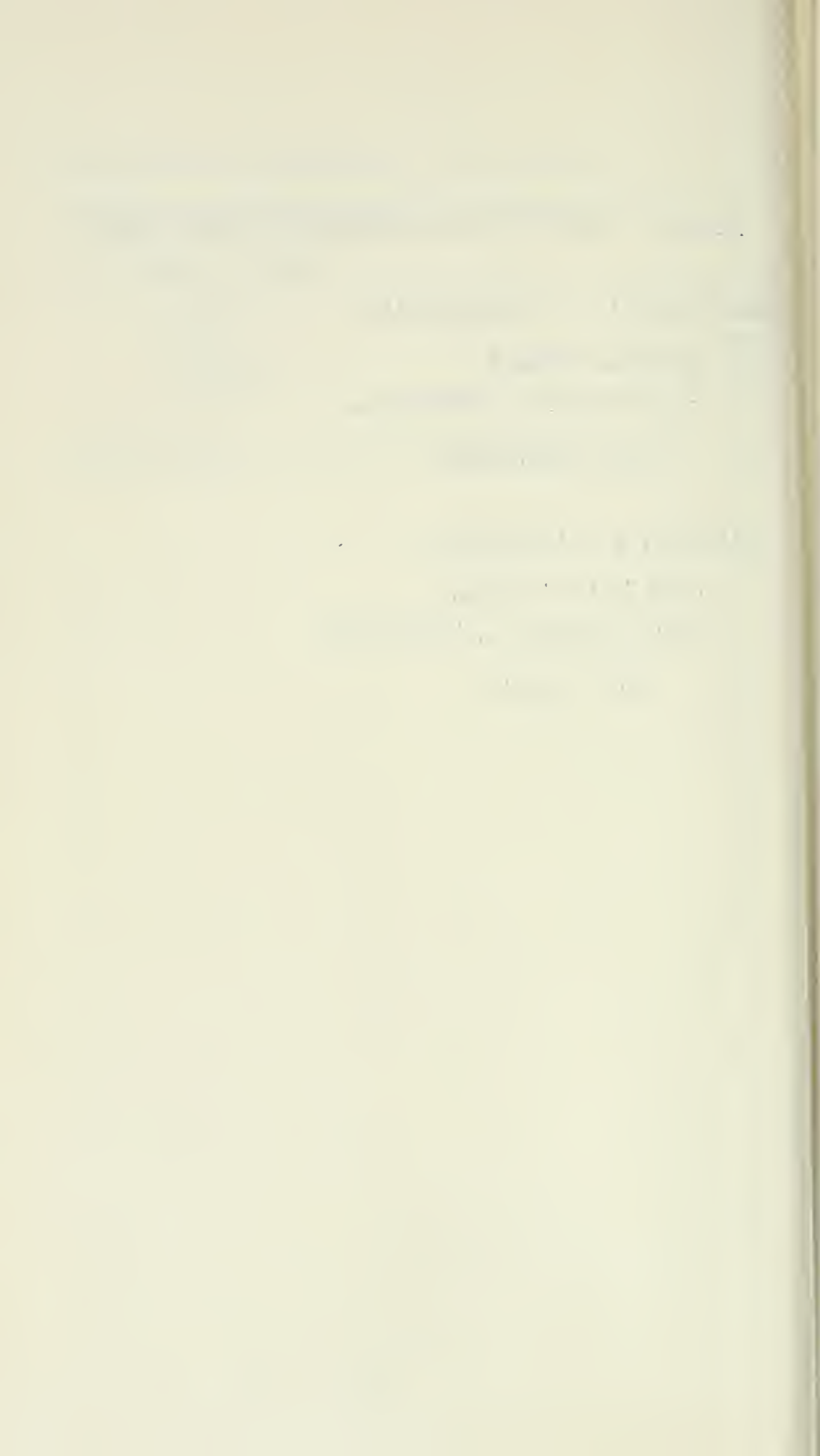
185 Post Street,
San Francisco, California,

For Appellant.

EISNER & TITCHELL,

1074 Mills Building,
San Francisco 4, California,

For Appellee.



In the United States District Court, Northern
District of California, Southern Division

No. 35103-Civil

AMERICAN ALMOND PRODUCTS CO., INC.,
a corporation, Plaintiff,

vs.

SUNSET-STERNAU FOOD CO., a corporation,
Defendant.

EXCERPT FROM DOCKET ENTRIES

1955

Dec. 2—Filed complaint—issued summons.

21—Filed acknowledgment of service and entry of appearance for defendant.

1956

Jan. 19—Filed answer of defendant.

Aug. 23—Mailed notice dismissal calendar, Aug. 30, 1956.

30—Ordered case off dismissal calendar
(Goodman)

* * * * *

Sept. 11—Filed interrogatories by plaintiff to defendant.

* * * * *

Nov. 16—Filed answer of defendant to interrogatories by plaintiff.

* * * * *

1957

Jan. 14—Ordered case for trial Feb. 21, 1957.
(Goodman)

1957

Feb. 21—Ordered case assigned to Judge Roche for trial this date. (Goodman)

21—Court trial. Pre-trial conference held, answer of defendant amended, evidence and exhibits introduced and further trial continued to Feb. 25, 1957 at 10 A.M. (Roche)

25—Further Court trial. Evidence and exhibits introduced and further trial cont'd. to Feb. 26, 1957 at 10 A.M. (Roche)

26—Further Court trial. Evidence and exhibits introduced, arguments heard, memos. ordered filed 5-5-5 days and case cont'd. to March 18, 1957 for further argument and submission. (Roche)

* * * * *

Mar. 18—Further court trial. Arguments heard and case cont'd. to March 25, 1957, for further argument and submission. (Roche)

25—Further Court trial. Arguments heard and case cont'd. to April 8, 1957 for submission. (Roche)

Apr. 8—Ordered, case cont'd. to April 15, 1957 for further trial. (Roche)

12—Filed reporter's transcript of proceedings Feb. 21, 25, 26 and Mar. 25, 1957.

* * * * *

Apr. 15—Ordered after hearing, case submitted and judgment ordered for plaintiff. Counsel to prepare findings, conclusions & judgment. (Roche)

* * * * *

1957

Apr. 23—Filed approval of findings of fact and conclusions of law and judgment as to form, by defendant.

May 2—Filed findings & conclusions. (Roche)

May 2—Entered judgment—filed May 2, 1957—
for plaintiff vs. Sunset-Sternau Food Co.
in sum \$37,500.00 and costs. (Roche)

2—Mailed notices.

* * * * *

13—Filed notice by deft. of motion for new trial, May 27, 1957, with proposed form of findings & conclusions attached.

13—Filed order staying execution until ruling on motion for new trial and 10 days thereafter. (Roche)

* * * * *

28—Hearing on motion for new trial. Arguments heard and motion denied. (Roche)

June 3—Filed stipulations that arguments made May 28, 1957 be considered arguments on both motions.

3—Filed order denying motion for new trial and to vacate judgment. (Roche)

6—Filed order staying execution 10 days from June 5, 1957. (Roche)

6—Filed notice of appeal by deft.

7—Mailed notices.

26—Filed order staying execution 10 days from this date. (Roche)

July 16—Filed order extending time to docket appeal for 50 days from this date and staying execution 10 days. (Roche)

1957

July 26—Filed order staying execution 10 days from this date. (Goodman)

Aug. 12—Filed appeal bond to stay execution in sum of \$42,000.00, “Approved as to form and sufficiency of surety, Aug. 12, 1957, Louis E. Goodman, Judge US District Court.”

[Title of District Court and Cause.]

COMPLAINT FOR DAMAGES FOR
BREACH OF CONTRACT

Plaintiff complains of defendant and alleges:

I.

That plaintiff is a corporation incorporated under the laws of the State of New York; that defendant is a corporation incorporated under the laws of the State of California.

The matter in controversy exceeds, exclusive of interest and costs, the sum of Three Thousand Dollars (\$3000.00).

II.

That on or about the 8th day of September, 1955, plaintiff and defendant entered into a contract in writing, whereby defendant agreed to sell to plaintiff and plaintiff agreed to purchase from defendant approximately seventy-five (75) tons of “Regular Apricot Kernels”, 1955 crop, packed in 100-pound net bags, Sunset Brand, at 17½ cents per pound, f.o.b. West Coast dock, terms: less 2 per cent—2 days’ sight draft, shipment from Cali-

fornia, half of quantity about October 31, 1955, balance about November 30, 1955. That in connection with said sale, defendant submitted a sample of apricot kernels, which sample was of good merchantable quality, and was approved by plaintiff. That the term "Regular Apricot Kernels", according to a general and well established custom and usage existing among those engaged in the California apricot kernel trade, means and meant at the time said contract was entered into, that broken kernels in any delivery shall not exceed five per cent (5%) by weight.

III.

That plaintiff has duly performed all terms and conditions upon its part to be performed, and has at all times been ready, able and willing to accept and pay for said merchandise.

IV.

That plaintiff has demanded of defendant delivery of said apricot kernels, but that the defendant has failed, neglected and refused to deliver same or any part thereof.

V.

That plaintiff has suffered damages by reason of the breach and default of defendant in the sum of Thirty-seven Thousand Five Hundred Dollars (\$37,500.00), no part of which has been paid.

Wherefore, plaintiff prays judgment against de-

fendant for the sum of \$37,500.00, interest, and costs of suit.

/s/ By NORMAN A. EISNER,
EISNER & TITCHELL,
Attorneys for Plaintiff.

[Endorsed]: Filed December 2, 1955.

[Title of District Court and Cause.]

ACKNOWLEDGMENT OF SERVICE AND ENTRY OF APPEARANCE

Sunset-Sternau Food Co., a corporation, by and through its counsel, hereby acknowledges service of the Summons and Complaint in the above captioned proceeding and hereby enters its appearance therein.

Dated: December 15th, 1955.

/s/ RAYMOND J. O'CONNOR,
Attorney for Sunset-Sternau Food
Co., a Corporation.

[Endorsed]: Filed December 21, 1955.

[Title of District Court and Cause.]

ANSWER OF DEFENDANT SUNSET - STER- NAU FOOD COMPANY, A CORPORATION

Comes Now Defendant Sunset-Sternau Food Company, a corporation, and answering the Complaint on file herein, admits, denies and alleges as follows:

I.

Answering the allegations contained in Paragraph I of the Complaint this answering defendant alleges that it has no information or belief within which to answer the allegations of plaintiff as a corporation incorporated under the laws of the State of New York, and upon that ground denies each and every, all and singular said allegations.

II.

Answering Paragraph II of the Complaint this defendant denies each and every, all and singular, generally and specifically, the allegations therein contained, and each and every part thereof.

III.

Answering Paragraphs III, IV and V of said Complaint, this defendant denies each and every, all and singular, generally and specifically, the allegations therein contained, and each and every part and the whole thereof.

Further Answering the Complaint on File Herein and for a Second, Separate and Affirmative Defense Thereto, This Defendant Alleges as Follows:

IV.

That said Complaint fails to state a claim against this defendant upon which relief can be granted and that said Complaint is based upon a contract required to be in writing as set forth in Section 1724 of the Civil Code of the State of California and Section 1973 of the Code of Civil Procedure

of the State of California, which said sections require that contracts as set forth in said Complaint must be in writing and signed by all parties thereto.

Wherefore, this defendant prays that plaintiff take nothing by reason of its Complaint on file herein and that it be dismissed hence with its costs of suit herein incurred and for such other and further relief as may be meet and proper in the premises.

/s/ RAYMOND J. O'CONNOR,
Attorney for Defendant Sunset-Sternau Food Company, a Corporation.

Acknowledgment of Service Attached.

[Endorsed]: Filed January 19, 1956.

[Title of District Court and Cause.]

MOTION OF PLAINTIFF FOR PRODUCTION
OF DOCUMENTS FOR INSPECTION,
COPYING OR PHOTOGRAPHING, PUR-
SUANT TO RULE 34, RULES OF CIVIL
PROCEDURE

The plaintiff, American Almond Products Co., Inc., moves the above entitled Court for an order requiring defendant, Sunset-Sternau Food Company, to produce and to permit plaintiff to inspect and to copy each of the following documents:

1. All correspondence and written communications, including letters and wires, that passed be-

tween defendant and Prince, Keeler & Co. Inc. during the years 1955 and 1956, pertaining to apricot kernels, including but not limited to:

(a) Notification that defendant has apricot kernels that Prince, Keeler & Co. Inc. could offer for sale;

(b) Authorization by defendant to Prince, Keeler & Co. Inc. to offer apricot kernels for sale;

(c) Letters or telegrams pertaining to or accompanying samples of apricot kernels;

(d) Letters or telegrams reporting a sale of apricot kernels by Prince, Keeler & Co. Inc. to plaintiff;

(e) Letters and telegrams pertaining to examination of samples of apricot kernels by plaintiff;

(f) Letters and telegrams referring to a custom of the trade limiting the percentage of broken kernels permissible in a delivery of regular apricot kernels;

(g) Communications enclosing or accompanying forms of contracts prepared by defendant and sent to Prince, Keller & Co. Inc.;

(h) Communications enclosing or accompanying return of said forms of contracts or any thereof from Prince, Keller & Co. Inc. to defendant;

(i) Any reply by letter or telegram by defendant to communications from Prince, Keller & Co. Inc. and in conjunction with which Prince, Keller & Co. Inc. returned contracts to defendant;

(j) Letters or telegrams in which defendant replied to Prince, Keller & Co. Inc. with reference

to the percentage of broken kernels in the samples submitted, or with reference to a trade custom pertaining to the percentage of broken kernels permissible in a delivery of regular apricot kernels;

(k) Letters and telegrams pertaining to non-delivery of apricot kernels by defendant to plaintiff;

(l) Letters and telegrams in which Prince, Keeler & Co. Inc. notified defendant of communications received from plaintiff pertaining to apricot kernels, including demands made by plaintiff for delivery of apricot kernels and/or threatening action in the event of non-delivery;

(m) Letters and telegrams from defendant to Prince, Keeler & Co. Inc. pertaining to delivery and/or non-delivery of apricot kernels by defendant to plaintiff;

(n) Letters and telegrams from defendant having reference to Rudy Bonzi, whether or not identified by name, and difficulties of defendant with Rudy Bonzi with respect to shelling and/or delivery of apricot kernels;

(o) Letters and telegrams seeking a cancellation or release of contract from sale and delivery of apricot kernels by defendant to plaintiff;

(p) Letters and telegrams in which defendant referred to the existence of a contract of purchase and sale of apricot kernels between defendant and plaintiff;

(q) Letters and telegrams in which defendant requested Prince, Keeler & Co. Inc. to communi-

cate with plaintiff pertaining to delivery of apricot kernels;

(r) Letters and telegrams in which defendant promised to cooperate in making delivery to plaintiff of apricot kernels;

(s) Any and all other communications that passed between defendant and Prince, Keller & Co. Inc. and having reference to a contract of sale by defendant and to plaintiff of apricot kernels, and acts done pursuant thereto or in performance thereof.

2. All correspondence and written communications that passed between defendant or the attorney for defendant and Rudy Bonzi during the years 1955 and 1956 and pertaining to apricot kernels including but not limited to the following:

(a) Communications referring to apricot kernels owned by defendant;

(b) Communications referring to apricot kernels owned by Rudy Bonzi;

(c) Communications referring to shelling of apricot kernels by Rudy Bonzi;

(d) Communications referring to difficulties incurred by Rudy Bonzi in shelling of apricot kernels;

(e) Communications referring to inadequacy or deficiency of machinery or equipment of Rudy Bonzi to shell apricot kernels;

(f) Communications referring to samples of apricot kernels supplied by said Rudy Bonzi to defendant;

(g) Communications referring to the percentage of broken kernels in apricot kernels shelled by Rudy Bonzi;

(h) Communications referring to the trade custom limiting percentage of broken kernels in a delivery of regular apricot kernels;

(i) Communications of defendant or the attorney for defendant to Rudy Bonzi demanding delivery of apricot kernels;

(j) Communications from defendant or the attorney for defendant to Rudy Bonzi threatening action against Rudy Bonzi for non-delivery of apricot kernels;

(k) Communications from Rudy Bonzi or from defendant to Rudy Bonzi with reference to obtaining a release or cancellation of contract between defendant and plaintiff for sale and delivery of seventy-five (75) tons of regular apricot kernels;

(l) Communications having reference to the shelling of apricot kernels by California Packing Corporation or someone other than said Bonzi;

(m) Communications having reference to a visit by Jack Kaplan to Mr. Sternau;

(n) Any other communications by letter or wire that passed between defendant and Rudy Bonzi and upon the subject of apricot kernels during the years 1955 and 1956.

3. Sold note or memorandum sent by Prince, Keller & Co. Inc. to defendant covering sale of seventy-five tons of regular apricot kernels by defendant to plaintiff;

4. Contract prepared by defendant based on the sold note or memorandum referred to in the immediately preceding specification.

5. All contracts or agreements between defendant and Rudy Bonzi pertaining to the sale or shelling of apricot kernels whether belonging to defendant or said Bonzi, or pertaining to any joint venture between defendant and said Bonzi in connection with apricot kernels.

This motion includes originals of all documents received by defendant and copies of all documents sent by defendant.

This motion is made pursuant to Rule 34 of the Rules of Civil Procedure and is supported by the affidavit of Norman A. Eisner, an attorney for the plaintiff, and which is filed herewith.

Dated: September 11th, 1956.

EISNER & TITCHELL,
/s/ By NORMAN A. EISNER,
Attorneys for Plaintiff.

NOTICE OF MOTION

To: Sunset-Sternau Food Company, a corporation, defendant, and to Raymond J. O'Connor, Esquire, its attorney:

Please Take Notice that the undersigned will bring the above motion on for hearing before the above entitled Court, at Room 258, Post Office Building, Seventh and Mission Streets, San Francisco, California on Monday the 17th day of Sep-

tember, 1956, at 9:30 o'clock A.M., or as soon thereafter as counsel can be heard.

Dated: September 11, 1956.

EISNER & TITCHELL,
/s/ By NORMAN A. EISNER,
Attorneys for Plaintiff.

Points and Authorities

Rule 34, Federal Rules of Civil Procedure.

Certificate of Service Attached.

[Endorsed]: Filed September 11, 1956.

[Title of District Court and Cause.]

AFFIDAVIT IN SUPPORT OF MOTION OF
PLAINTIFF FOR PRODUCTION OF DOC-
UMENTS FOR INSPECTION, COPYING
OR PHOTOGRAPHING, PURSUANT TO
RULE 34, RULES OF CIVIL PROCE-
DURE

State of California

City and County of San Francisco—ss.

Norman A. Eisner, being first duly sworn, deposes and says:

That he is an attorney at law, duly licensed to practice as such in the United States District Court for the Northern District of California, Southern Division; that he is one of the attorneys for the plaintiff in the above entitled action and makes this affidavit in support of Motion for pro-

duction of documents made pursuant to Rule 34 of the Rules of Civil Procedure.

That the complaint in said action sets forth a cause of action for breach of contract for the sale by defendant to plaintiff of seventy-five (75) tons of regular apricot kernels, and which contract was entered into on or about September 8, 1955. Non-delivery by defendant is pleaded and damages resulting from such non-delivery are prayed for. Due performance by plaintiff and demand upon defendant for delivery are also alleged.

The answer of defendant puts in issue the existence of a contract and denies generally and specifically all allegations of the complaint. The answer also pleads as an affirmative defense, the Statute of Frauds.

Plaintiff is a New York corporation and has its place of business in New York. Defendant is a California corporation and has its place of business in Modesto. Prince, Keller & Co. Inc. is a corporation engaged in the merchandise brokerage business in the City of New York. That defendant offered apricot kernels to plaintiff through said brokerage concern and that said brokerage concern issued its broker's memoranda consisting of bought and sold notes, which were delivered to plaintiff and defendant respectively. That proof of authority of Prince, Keeler & Co. Inc. to negotiate said sale, ratification and recognition of said sale by defendant, written admissions of said sale, and acts done by defendant pursuant to and in performance of said contract are all relevant and material to the issues and to said affirmative defense. That all

communications that passed between defendant and Prince, Keeler & Co. Inc. bearing upon the subject of apricot kernels preceding and succeeding the issuance of the broker's memoranda hereinbefore referred to and during the years 1955 and 1956 are pertinent, and, according to the belief of affiant, contain evidence and admissions bearing directly upon the issues of this case.

That the complaint alleges a trade custom by which the percentage of broken kernels in any delivery of "regular apricot kernels" which are the subject matter of the contract alleged in this action cannot exceed five per cent (5%) by weight. The answer has put the existence of such custom in issue, and the correspondence between defendant and Prince, Keller & Co. Inc., according to the information and belief of affiant, contains admissions by defendant of the existence of such a custom.

The complaint alleges that samples of apricot kernels were submitted by defendant to plaintiff and that plaintiff approved the quality of the said samples. These allegations are also put in issue by the answer.

Correspondence between defendant and Prince, Keeler & Co. Inc., according to affiant's information and belief will have direct bearing on the matter of said samples and their approval as to quality by plaintiff.

That according to the information and belief of affiant, formal contracts covering the said sale to plaintiff were prepared by defendant and forwarded to Prince, Keeler & Co. Inc.; that all cor-

respondence bearing upon said contracts and what was done with them is relevant and material.

That according to the information and belief of affiant, defendant had an agreement or arrangement of some character, whether as joint venture, partners, or otherwise, with one Rudy Bonzi, whereby defendant depended upon said Rudy Bonzi for the supplying of said apricot kernels or portions thereof. That defendant has made the alleged failure of said Bonzi to comply with his portion of the agreement an excuse for non-delivery to plaintiff.

That all documents and communications that passed between said Bonzi and defendant pertaining to apricot kernels at or about the time of and following this transaction, as well as all demands upon Bonzi made by defendant, will, according to the information and belief of affiant, contain statements and disclose circumstances relevant and material to the issues in this case and contain admissions by the defendant of the existence of the contract sued upon, the existence of the custom of the trade alleged, the default of defendant in delivery, the increase in market value of the apricot kernels and the resulting damages suffered by plaintiff.

That all communications that passed between plaintiff and defendant pertaining to said transaction will be pertinent to the allegations of the complaint and all of which allegations are put in issue by the answer.

That all of said documents, originals if received

by defendant, and copies if sent by defendant, are in the possession and under the control of defendant.

Dated: September 11, 1956.

/s/ NORMAN A. EISNER.

Subscribed and sworn to before me this 11th day of September, 1956.

[Seal] /s/ LORRAINE PACKARD,
Notary Public in and for the City and County of
San Francisco, State of California. My Com-
mission Expires December 30, 1956.

[Endorsed]: Filed September 11, 1956.

[Title of District Court and Cause.]

INTERROGATORIES AND ANSWERS THERE TO

To Raymond J. O'Connor, Esquire, Attorney for
Defendant:

Plaintiff requests that the defendant, by an officer or agent thereof, answer under oath, in accordance with Rule 33 of the Federal Rules of Civil Procedure, the following interrogatories:

1. Over what period of time has defendant done business with Prince, Keeler & Co. Inc.?

Interrogatories propounded by plaintiff under Rule 33 of the Federal Rules of Civil Procedure on September 11, 1956, are hereby answered as follows:

1. Approximately five years.

2. In 1955, did defendant notify Prince, Keeler & Co. Inc. that it could offer for sale on behalf of defendant regular apricot kernels?

2. Yes.

3. If there was such notification, when was it given?

If oral, state when and by whom the notification was given and the substance of what was said.

If in writing, what are the dates of the writings and by whom were they signed.

3. Approximately July 15, 1955, orally, by S. Sternau, that seventy-five tons of apricot kernels would be available for sale.

4. Were there any written communications by letter or telegram that passed between defendant and Prince, Keller & Co. Inc. in the year 1955, pertaining to the sale by Prince, Keeler & Co. Inc. of regular apricot kernels on behalf of defendant?

4. Yes.

5. If there were any such written communications, what are the dates of same and by whom were they signed?

5. All correspondence on subject submitted to plaintiff.

6. When was defendant first notified by Prince, Keeler & Co. Inc. of a sale to plaintiff on behalf of defendant of regular apricot kernels?

6. Defendant notified of offer to purchase by telegram 8-31-55.

7. Was such notification written or oral?

7. By telegram, 8-31-55.

8. If in writing, what was the date of the writing and by whom was it signed?

8. Letter confirming offer to purchase sent to defendant by Prince, Keeler Co. Inc., signed by Wm. Berke, dated 9-1-55.

9. Did defendant receive a Sold Note or a memorandum from Prince, Keeler & Co. Inc. covering the sale of regular apricot kernels to plaintiff, and if so, when was it received?

9. Yes, received approximately 9-2-55, dated 9-1-55; "Sold Note" never recognized by defendant in dealings with Prince, Keeler Co. Inc. at any time, treated as offer only, subject to signing written contract of defendant.

10. Did any written communication accompany said Sold Note, and if so, what was the date of it and by whom was it signed?

10. Yes, 9-1-55, signed Wm. Berke.

11. Did defendant acknowledge receipt of said Sold Note?

11. No.

12. If defendant did acknowledge receipt in writing, please give the date of the writing and by whom it was signed.

12. ———.

13. Did defendant send samples of apricot kernels to Price, Keeler & Co. Inc., and if so, when were they sent?

13. Yes, 8-31-55.

14. Were there any written communications that passed between defendant and Prince, Keeler & Co. Inc. pertaining to said samples or the submission of same to plaintiff?

14. Yes.

15. If there were any such communications, please give the dates of same and by whom they were signed.

15. Telegram, 8-31-55, by defendant.

16. Did defendant receive any written communications from Prince, Keeler & Co. Inc. following the submission of said samples to plaintiff pertaining to the findings of plaintiff with respect to said samples?

16. Yes.

17. If defendant did receive any such communications please give the dates of same and by whom they were signed.

17. 9-8-55, letter, signed Frank L. Sullivan.

18. Did defendant send any written communications to Prince, Keeler & Co. Inc. in response to notifications by Prince, Keeler & Co. Inc. of the results of plaintiff's examination of said samples?

18. Yes.

19. If there were any such written communications, please give the dates of same and by whom they were signed.

19. Letter dated 9-21-55, signed S. M. Sternau.

20. Did defendant prepare a written contract covering the sale of regular apricot kernels to plaintiff, and if so when did it do so?

20. Yes, 9-6-55.

21. Did defendant send the contract so prepared to Prince, Keeler & Co. Inc.?

21. Yes.

22. Did defendant write a letter to Prince, Keeler & Co. Inc. with which said contracts were forwarded?

22. No.

23. If defendant did write such a letter accompanying said contracts, please give the date of same and by whom was it signed.

23. ———.

24. Did defendant receive any written communications from Prince, Keeler & Co. Inc. with respect to said contracts?

24. Yes.

25. If the answer is "Yes" to the last interrogatory, please give the dates of the communications and by whom they were signed.

25. Yes, letter dated 9-8-55, signed by Frank L. Sullivan.

26. Did Prince, Keeler & Co. Inc. return said contracts or any thereof to defendant?

26. Yes.

27. If said contracts or any thereof were returned to defendant, was any letter at the same time written to defendant by Prince, Keeler & Co. Inc.?

27. Yes.

28. If any letter was written and with which said contracts or any thereof were returned to defendant, please give the dates of same and by whom signed.

28. Letter dated 9-8-55, signed by Frank L. Sullivan.

29. Did defendant receive any letter or letters from Prince, Keeler & Co. Inc. pertaining to a trade custom limiting the quantity of broken kernels in any delivery of regular apricot kernels?

29. Yes.

30. If any such letters were received, as referred to in the preceding interrogatory, please give the dates of same and by whom they were signed.

30. Letter, dated 9-8-55, signed by Frank L. Sullivan.

31. Did defendant reply to any communications received from Prince, Keeler & Co. Inc. and with

which communications said contracts were returned to defendant?

31. Yes.

32. If the answer to the preceding interrogatory is "Yes", please give the dates of same and by whom signed.

32. Letter, dated 9-21-55, signed by S. M. Sternau.

33. What, if anything, did defendant do with respect to the contracts after the return thereof by Prince, Keeler & Co. Inc.?

33. Refused to send further contract pending clearance of differences between offer and ability to comply with conditions of offer.

34. Who is Rudy Bonzi?

34. Resident of Modesto, California.

35. Did defendant, in 1955, have any arrangement or transaction with Rudy Bonzi pertaining to apricot kernels?

35. Yes.

36. If the answer to the preceding interrogatory is "Yes", please state what the arrangement or transaction was.

36. Bonzi agreed, orally, to supply seventy-five tons apricot kernels to defendant for resale by defendant.

37. Was there any written agreement between

defendant and Rudy Bonzi pertaining to apricot kernels?

37. No.

38. If the answer to the preceding interrogatory is "Yes", please give the dates of the agreements and by whom signed.

38. ———.

39. Where and from whom did defendant receive the samples of apricot kernels forwarded to Prince, Keeler & Co. Inc.?

39. Rudy Bonzi.

40. Who shelled the apricot kernels, samples of which were forwarded to Prince, Keeler & Co., Inc.?

40. Continental Nut Company, Chico, California.

41. Did defendant, in or about the month of September, 1955, have any communications with Rudy Bonzi pertaining to the shelling of apricot kernels?

41. Yes.

42. If the answer to the preceding interrogatory is "Yes", and the communications were oral, please state the substance of the communications, when and where made and to whom, and persons present, and if in writing, please give the dates and by whom signed.

42. Oral, Bonzi stated to defendant, to S. M. Sternau, L. Hanshaw and S. Tarrico, he was now

unable to shell apricot kernels himself but was endeavoring to find and would find someone who would shell them; conversations at various times during month, dates unknown.

43. To your knowledge did Rudy Bonzi have plant difficulty in the shelling of the apricot kernels?

43. Yes.

44. Did Rudy Bonzi notify defendant that he had plant difficulty in shelling apricot kernels, and if so, when, where, who were present and what was said?

44. Yes—August and September, 1955, at Modesto; Bonzi present, Hanshaw, S. M. Sternau and Stephen Tarrico, dates unknown. Bonzi still claimed he could set up his own plant to do shelling but in any event would be able to get them shelled.

45. Did defendant receive any written communications from Rudy Bonzi pertaining to said difficulty of Rudy Bonzi in shelling apricot kernels?

45. No.

46. If defendant did receive any such written communications, as referred to in the preceding interrogatory, please give the dates and by whom signed.

46. ———.

47. Did defendant write any letter or letters to

Rudy Bonzi pertaining to the shelling of apricot kernels or the reduction of broken kernels in the shelling process?

47. No.

48. If the answer to the preceding interrogatory is "Yes", please give the dates and by whom signed.

48. _____.

49. Did Rudy Bonzi ask defendant to endeavor to have him relieved of the obligation to supply apricot kernels for delivery to plaintiff?

49. No.

50. If the answer to the preceding interrogatory is "Yes", please state whether the request was written or oral, and if oral state when, by whom made, persons present, and what was said.

50. _____.

51. If any such request was in writing, please give the date and by whom signed.

51. _____.

52. Did defendant on or about September 21, 1955, write a letter to Prince, Keeler & Co. Inc. pertaining to the obtaining by Prince, Keeler & Co. Inc. of a cancellation or termination of the contract for delivery of apricot kernels to plaintiff?

52. Defendant wrote Prince, Keeler Co. Inc. 9-21-55 advising it could not guarantee five per cent pieces, apricot kernels, and that the packer

(Bonzi) would like to be relieved of any obligation, even though oral and not in writing to defendant or to plaintiff.

53. If the answer to the preceding interrogatory is "Yes", please give the date and by whom signed.

53. Letter, 9-21-55, signed S. M. Sternau.

54. Did Mr. S. M. Sternau have any personal conversations with Mr. Jack Kaplan in Modesto in the month of September, 1955?

54. Yes.

55. If the answer to the preceding interrogatory is "Yes", please state when and where such conversations were held and the persons present.

55. Held at law office of Zeff, Halley & Price, Modesto; present: Jack Kaplan, Norman Eisner, L. Hanshaw, S. M. Sternau, E. Dean Price, attorney for Rudy Bonzi, and Rudy Bonzi.

56. Please state what was said at these conversations as nearly and fully as you can recollect.

56. Kaplan advised that if Bonzi unable to shell that California Packing Corporation would do the shelling—Bonzi stated he would think it over—Kaplan stated market price per pound 45c—Bonzi said it was approximately 30c per pound; on the same date later, in the office of defendant, Bonzi, Kaplan, Tarrico and Sternau present: Kaplan offered to pay more money for shelled kernels than he originally offered; defendant offered to throw its sixty wet tons into the deal and waive broker-

age fee—if Bonzi would make delivery—Bonzi left stating he would think it over.

57. Following conversations between Mr. Sternau and Mr. Kaplan, did defendant receive any written communications from Prince, Keeler & Co. Inc. pertaining to the conversations that had taken place between Mr. Sternau and Mr. Kaplan?

57. Yes.

58. If the answer to the preceding interrogatory is “Yes”, please give the dates and by whom signed.

58. 9-28-55, signed Alex Astrack.

59. Did defendant reply to Prince, Keeler & Co. Inc. in response to any such communications from Prince, Keeler & Co. Inc. and which referred to conversations that had taken place between Mr. Sternau and Mr. Kaplan?

59. Yes.

60. If the answer to the preceding interrogatory is “Yes”, please give the dates and by whom signed.

60. Oral — by telephone, S. M. Sternau, early October, 1955.

61. At or about the time of the conversations between Mr. Sternau and Mr. Kaplan, did Mr. Kaplan arrange to have California Packing Corporation agree to shell the apricot kernels to be delivered to plaintiff?

61. No such arrangement made by Kaplan with

Sternau—such arrangement, if any, made between Kaplan and Bonzi.

62. Did defendant, after the conversations between Mr. Sternau and Mr. Kaplan, have any communications, written or oral, with California Packing Corporation or any officer or employee thereof, pertaining to the shelling of apricot kernels?

62. No.

63. If the answer to the preceding interrogatory is "Yes", please state the substance of any conversation, giving the time, place and persons present, and if there were any written communications, please give the dates and by whom signed.

63. ———.

64. Did defendant receive any letters or telegrams from Prince, Keeler & Co. Inc. pertaining to non-delivery by defendant of the apricot kernels to plaintiff?

64. Yes.

65. If the answer to the preceding interrogatory is "Yes", please give the dates of the communications and by whom signed.

65. Telegram, 10-21-55, by Prince, Keeler & Co. Inc.

66. Did the defendant receive any telephone communications from Prince, Keeler & Co. Inc. pertaining to non-delivery by defendant of said apricot kernels to plaintiff?

66. Do not recall at this time.

67. If the answer to the preceding interrogatory is "Yes", please state the time, the persons speaking, and the substance of said telephone conversations.

67. ———.

68. Did defendant write any letters or send any telegrams to Prince, Keeler & Co. Inc. pertaining to the delivery or non-delivery by defendant of apricot kernels to plaintiff?

68. Yes.

69. If the answer to the preceding interrogatory is "Yes", please give the dates and by whom signed.

69. Letter, 10-31-55, signed S. M. Sternau.

70. Did defendant or its attorney make any demands upon Rudy Bonzi for the delivery of apricot kernels intended for delivery to plaintiff?

70. Yes.

71. If the answer to the preceding interrogatory is "Yes", please state fully when the demands were made, by whom, the persons present and the substance of what was said.

71. Orally, many times, by telephone and in person, with L. Hanshaw and S. Tarrico, dates unknown, probably during September and October, 1955.

72. If any demands were in writing, please give the dates and by whom signed.

72. Letter, 10-31-55, signed, Raymond J. O'Connor; letter, 11-3-55, signed, Raymond J. O'Connor.

73. Were any communications received by defendant from Rudy Bonzi or any attorney for Rudy Bonzi in response to any such demands by defendant?

73. Yes.

74. If any communications were received and if they were oral, please state when, where, the persons present, and the substance of what was said.

74. ———.

75. If any such communications were in writing, please give dates and by whom signed.

75. Letter, 11-16-56, signed, E. Dean Price, attorney for Bonzi.

76. Did defendant receive any communications in writing directly from plaintiff pertaining to or demanding delivery of apricot kernels?

76. Yes.

77. If the answer to the preceding interrogatory is "Yes", please give the dates and by whom signed.

77. Letter, 10-25-55, signed, Jack M. Kaplan.

78. Did defendant reply to any such communications or demands received from plaintiff?

78. No.

79. If the answer to the preceding interrogatory is "Yes", give the dates and by whom signed.

79. ———.

80. Did the defendant receive written communications from Prince, Keeler & Co. Inc. pertaining to demands made by plaintiff for delivery of apricot kernels and a threat of action by plaintiff if delivery was not made?

80. Yes.

81. If the answer to the preceding interrogatory is "Yes", please give the dates and by whom signed.

81. Telegram dated 11 - 1 - 55, signed Prince, Keeler & Co.

82. Did defendant receive from Prince, Keeler & Co. Inc. copies of or extracts from any communications received by Prince, Keeler & Co. Inc. from plaintiff with respect to non-delivery of apricot kernels by defendant to plaintiff?

82. Yes.

83. If the answer to the preceding interrogatory is "Yes", please give the dates of the communications from Prince, Keeler & Co. Inc. and by whom signed.

83. Letter, 11-3-55, signed Wm. Berke.

84. Did defendant receive a letter from Prince, Keeler & Co. Inc. dated October 26, 1955, pertaining to apricot kernels?

84. No record.

85. Did defendant write a letter to Prince, Keeler & Co. Inc. on or about October 31, 1955,

pertaining to the non-delivery of the apricot kernels to plaintiff?

85. Yes.

86. Did defendant receive any letter from Prince, Keeler & Co. Inc. dated November 7, 1955, pertaining to a communication received by Prince, Keeler & Co. Inc. from plaintiff respecting non-delivery of the apricot kernels?

86. Yes.

87. Did defendant, in the month of November, 1955, write a letter to Prince, Keeler & Co. Inc. pertaining to the sale of apricot kernels to plaintiff, and in which said letter defendant promised to cooperate in every way possible to make delivery of said apricot kernels?

87. Yes.

88. Did either defendant or the attorney for defendant write any letters to Rudy Bonzi demanding delivery of apricot kernels or threatening action for non-delivery of apricot kernels, or pertaining to apricot kernels for delivery to plaintiff that have not already been identified in response to preceding interrogatories?

88. Already answered.

89. If there are any such letters, please give the dates and by whom signed.

89. ———.

90. Were there any written communications by

letter or by telegram that passed between Prince, Keeler & Co. Inc and defendant pertaining to the sale of apricot kernels to plaintiff that have not already been identified in response to these interrogatories?

90. No record.

91. If the answer to the preceding interrogatory is "Yes", please give the dates and by whom signed.

91. ———.

Please take notice that a copy of the answers to the foregoing interrogatories must be served upon the undersigned within fifteen (15) days after the service of these interrogatories.

Dated: September 11, 1956.

EISNER & TITCHELL,
/s/ By NORMAN A. EISNER,
Attorneys for Plaintiff.

Acknowledgment of Service Attached.

[Answers to Interrogatories signed by Raymond J. O'Connor, Attorney for Defendant.]

[Endorsed]: Interrogatories filed September 11, 1956. Answers filed November 16, 1956.

[Title of District Court and Cause.]

APPROVAL OF FINDINGS OF FACT, CON-
CLUSIONS OF LAW AND JUDGMENT
AS TO FORM

Plaintiff having heretofore submitted Findings of Fact, Conclusions of Law and Judgment by and through its attorney Norman A. Eisner of the firm of Eisner & Titchell, to defendant by and through Raymond J. O'Connor, its attorney, for approval or disapproval as to form, and defendant having examined the same, approves said documents as to form but not as to substance and content.

Dated: April 22nd, 1957.

/s/ RAYMOND J. O'CONNOR,
Attorney for Defendant.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed April 23, 1957.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS
OF LAW

The above entitled action, having come on regularly for trial before the above entitled court, Honorable Michael J. Roche presiding without a jury, Norman A. Eisner of the firm of Eisner & Titchell appearing on behalf of the plaintiff, and Raymond J. O'Connor on behalf of defendant, and evidence, oral and documentary having been duly heard and

considered, and the said action having been submitted, the court does now render its decision and finds as follows:

Findings of Fact

The court finds the following to be the facts:

1. That plaintiff is a corporation incorporated under the laws of the State of New York.

2. That defendant is a corporation incorporated under the laws of the State of California.

3. That on or about the 1st day of September, 1955, defendant agreed to sell to plaintiff, and plaintiff agreed to purchase from defendant, approximately 75 tons of regular apricot kernels, 1955 crop, packed in 100# net bags, Sunset brand, at 17½¢ per pound, f.o.b. west coast dock, terms, less 2%—2 days' sight draft, shipment from California, half the quantity about October 31, 1955, balance about November 30, 1955. That said sale was made subject to approval by buyer of two bags of apricot kernels then enroute as samples.

4. That said purchase and sale was negotiated through Prince Keeler & Co. Inc. of New York, acting as broker. That on or about said first day of September, 1955, said Prince Keeler & Co. Inc. acting as broker and as agent of both seller and buyer, issued and signed a written memorandum of said sale, one signed copy of which, designated as "bought note", was delivered to and received by plaintiff, and one signed copy of which designated as "sold note", was delivered to and received by

defendant. That said bought and sold notes fully set forth the terms of said sale. That said memorandum further sets forth that the sale is subject to confirmation of seller and approval of sample by buyer. That it further recites, "This memorandum shall be subordinate to a more formal contract if and when such a contract is executed; in the absence of such contract, this memorandum represents the contract of the parties."

5. That the two bag sample of apricot kernels was received by plaintiff from defendant on or about the 8th day of September, 1955. That on or about said 8th day of September, 1955, plaintiff examined and approved the said sample and notified Prince Keeler & Co. Inc. of said approval. That on the same day Prince Keeler & Co. Inc. by letter informed defendant that plaintiff had approved the sample.

6. That defendant confirmed said sale, and repeatedly, both orally and in writing, recognized and ratified the said contract of sale, and likewise in writing ratified the act and authority of Prince Keeler & Co. Inc. in executing the memorandum of sale on its behalf.

7. That there is and for many years prior to the commencement of this action has been, a general and well established trade custom and usage among those engaged in the California apricot kernel trade, that the term "regular apricot kernels" means, identifies and describes apricot kernels in any delivery of which the broken kernels shall not

exceed 5% by weight. That according to trade practice, said tolerance of broken kernels is sometimes set forth in contracts of sale of regular apricot kernels and sometimes it is not set forth, but when not set forth it is implied. That the sample of apricot kernels submitted by defendant to plaintiff was a type sample representative of quality and had nothing to do with the quantity or percentage of broken kernels that would be present in any delivery under the contract. That said trade custom and usage is a part of the contract of sale by defendant to plaintiff.

8. That it was not intended by the parties that the existence of a contract should be dependent on the execution of a formal contract; that no formal contract was ever executed and that the broker's memorandum constitutes the contract of the parties.

9. That from and after the first day of September, 1955 and until November 16, 1955, defendant, both orally and in writing, repeatedly promised and assured plaintiff that it would make delivery under said contract. That from the first day of September, 1955 until the 16th day of November, 1955, the market price of regular apricot kernels, 1955 crop, f.o.b. west coast dock, gradually rose from 17½c per pound, and which was the market price on September 1, 1955, to 43c per pound which was the market price on November 16, 1955. That plaintiff relied upon the promises and assurance of defendant to its detriment. That defendant for the

first time refused to make delivery on November 16, 1955 and at which time the market price had risen to 43c per pound, far in excess of that price at which plaintiff could and would have purchased said regular apricot kernels if not led to believe that defendant would perform the contract. That defendant is by its conduct estopped to rely upon the statute of frauds as a defense in this case and estopped to deny the existence of the contract.

10. That from and after the first day of September, 1955 until the 16th day of November, 1955, the defendant repeatedly and consistently promised and assured plaintiff that it would deliver the 75 tons of regular apricot kernels and fulfill the terms of said contract. That on November 16, 1955 defendant for the first time refused to perform said contract and refused to make delivery of any of the regular apricot kernels called for by said contract. That at the time of said refusal the market price of regular apricot kernels, 1955 crop, f.o.b. west coast dock, was 43c per pound

11. That plaintiff made repeated demands upon defendant for performance, and duly complied with all the terms and conditions of said contract on its part. That defendant has failed and refused to perform on its part.

12. That it is not true that said complaint fails to state a claim against the defendant upon which relief can be granted, and that it is not true that plaintiff's cause of action is barred by Section 1724 of the Civil Code or Section 1973(a) of the Code of Civil Procedure of the State of California.

Conclusions of Law

From the foregoing Findings of Fact the court concludes that plaintiff has suffered damages by reason of the breach of contract by defendant, represented by the difference between the market price of 75 tons of regular apricot kernels, f.o.b. west coast dock, on November 16, 1955, which was 43c per pound, and 17½c per pound, the contract price. That said difference amounts to \$38,250.00. By reason of the fact that the prayer of the complaint is for \$37,500.00, plaintiff is entitled to judgment that it do have and recover from defendant the sum of \$37,500.00, together with costs of suit incurred herein.

Let Judgment Be Entered Accordingly.

/s/ MICHAEL J. ROCHE,
Judge of the U. S. District Court.

The foregoing Findings are hereby approved as to form.

Dated April 15th, 1957.

/s/ EISNER & TITCHELL,
Attorneys for Plaintiff.

[Endorsed]: Filed May 2, 1957.

In the United States District Court, Northern
District of California, Southern Division

No. 35103

AMERICAN ALMOND PRODUCTS CO. INC.,
a corporation, Plaintiff,

vs.

SUNSET-STERNAU FOOD CO., a corporation,
Defendant.

JUDGMENT

The above entitled action, having come on regularly for trial before the above entitled court, Honorable Michael J. Roche presiding without a jury, Norman A. Eisner of the firm of Eisner & Titchell appearing on behalf of the plaintiff, and Raymond J. O'Connor on behalf of defendant, and evidence, oral and documentary, having been duly heard and considered, and said cause having been submitted, and the court having rendered its decision herein, and Findings of Fact and Conclusions of Law having been duly made and filed;

Now, Therefore, in accordance therewith, It Is Hereby Ordered, Adjudged and Decreed that plaintiff, American Almond Products Co. Inc., a corporation, do have and recover from Sunset-Sternau Food Co., a corporation, the sum of \$37,500.00, together with costs of suit taxed in the sum of \$111.80.

Done in open court this 2nd day of May, 1957.

/s/ MICHAEL J. ROCHE,

Judge of the U. S. District Court.

Entered in Civil Docket 5/2/57.

[Endorsed]: Filed May 2, 1957.

[Title of District Court and Cause.]

MOTION FOR NEW TRIAL

To American Almond Products Co. Inc., a Corporation, Plaintiff, and its attorneys Eisner & Titchell:

Please Take Notice that on the 27th day of May, 1957, at the hour of 9:45 o'clock A. M. of said day, or as soon thereafter as the matter may be heard, the defendant will move His Honor, Judge Michael J. Roche in his Courtroom, United States Court House and Post Office Building, Seventh and Mission Streets, San Francisco, California, for an order vacating the judgment heretofore entered on the 2nd day of May, 1957, in favor of plaintiff and for an order granting a new trial upon the following grounds:

1) The Findings of Fact are against the evidence.

2) The Findings of Fact and Conclusions of Law are against the law.

3) The Court erred in finding as a fact that there was a contract in writing entered into between plaintiff and defendant which formed the basis of plaintiff's case.

4) That the Court erred in finding as a fact that a contract was entered into between plaintiff and defendant on or about September 1, 1955.

5) That the Court erred in finding as a fact that a written memorandum of sale issued by a broker constituted a contract between the plaintiff and defendant herein.

6) That the Court erred in finding as a fact that plaintiff approved a sample of apricot kernels submitted by defendant to plaintiff.

7) That the Court erred in finding as a fact that defendant confirmed the sale orally and in writing, recognized and ratified said contract, and in further finding that defendant ratified the authority of the broker in executing the memorandum of sale on behalf of defendant.

8) That the Court erred in finding that there was a trade custom and useage of those engaged in the business of selling apricot kernels and that said trade custom and useage was part of the alleged contract of sale between plaintiff and defendant herein.

9) That the Court erred in finding as a fact that the parties to this action did not intend that the existence of a contract should be dependent upon execution of a formal contract and that the broker's memorandum constituted a contract between the parties.

10) That the Court erred in finding as a fact that defendant promised and assured plaintiff it would make delivery of said contract, to wit, the broker's memorandum, and that plaintiff relied upon the promises and assurances of defendant of delivery under the memorandum to its detriment; that the Court erred in finding as a fact that defendant for the first time refused to make delivery on November 16th, 1955; that the Court erred in finding as a fact that defendant by its conduct is estopped to rely upon the Statute of Frauds as a

defense and is estopped to deny the existence of the contract.

11) That the Court erred in finding as a fact that plaintiff complied with all the terms and conditions of said alleged contract, to wit, the broker's memorandum, and that defendant failed and refused to perform on its part.

12) That the Court erred in finding as a fact that it is not true that the complete failure to state a claim against the defendant and in further finding that it is not true that plaintiff's cause of action was barred by Section 1724 of the Civil Code or Section 1973 (a) of the Code of Civil Procedure of the state of California.

13) That the Court erred in admitting evidence of trade usage and custom as part of plaintiff's case and in finding that said trade usage and custom became and was a part of the alleged contract between the parties hereto as evidenced by the broker's memorandum of September 1, 1955.

14) That the Court erred in excluding evidence offered by defendant that plaintiff had knowledge of the fact that defendant would not accept the broker's memorandum of sale of the kind involved in this case as a contract between the parties and that plaintiff knew that defendant only recognized orders for purchase which were reduced to a formal contract of defendant to be executed by both parties to the transaction.

15) That the Court erred in entering judgment for plaintiff.

The defendant will likewise move the Court at

said time and place for an order modifying and/or vacating the Findings of Fact and Conclusions of Law submitted by plaintiff and adopting the Findings of Fact and Conclusions of Law submitted by defendant which are attached hereto and made a part of this motion.

This motion will be based on the files, records, exhibits and transcript of testimony taken in this action.

/s/ RAYMOND J. O'CONNOR,
Attorney for Defendant.

[Title of District Court and Cause.]

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above entitled action, having come on regularly for trial before the above entitled court, Honorable Michael J. Roche, Judge Presiding, without a jury, Norman A. Eisner of the firm of Eisner & Titchell appearing on behalf of the plaintiff, and Raymond J. O'Connor on behalf of defendant, and evidence, oral and documentary, having been duly heard and considered, and the said action having been submitted, the court does now render its decision and finds as follows:

Findings of Fact

The Court finds the following to be the facts:

1) That plaintiff is a corporation incorporated under the laws of the State of New York.

2) That defendant is a corporation incorporated under the laws of the State of California.

3) That on or about the 1st day of September, 1955, plaintiff authorized the firm of Prince, Keeler & Co., Inc., of New York, a food brokerage firm, to place an order with defendant for the purchase by plaintiff from defendant of approximately 75 tons of regular apricot kernels, 1955 crop, packed in 100# net bags, Sunset brand, at 17½ per pound, f.o.b. west coast dock, terms, less 2%—2 days sight draft, shipment from California, half the quantity about October 31, 1955, balance about November 30, 1955. That said order was made subject to approval by plaintiff of two bags of apricot kernels.

4) That on or about the 1st day of September, 1955, said firm of Prince, Keeler & Co., Inc., acting as food brokers, issued an offer in writing authorized by plaintiff to defendant wherein plaintiff would agree to buy from defendant the apricot kernels under the terms and conditions set forth in paragraph 3) of these Findings and that said offer was received by defendant. That thereupon said defendant issued its formal contract and sent the same to the firm of Prince, Keeler & Co., Inc., requesting that said contract be executed by plaintiff. That Prince, Keeler & Co., Inc., orally informed plaintiff of its receipt of said contract and the terms contained therein on September 8th, 1955; that plaintiff at all times prior to said date and on said date knew and was aware of the fact that defendant would not recognize a written order or memorandum from a broker as binding upon itself

but did, in fact, only recognize any order for purchase when its formal contract had been signed by the proposed purchaser, in this case, the plaintiff in this action; that upon said date plaintiff refused to accept said contract or the terms thereof and instructed Prince, Keeler & Co., Inc., to return said contract to defendant for modification by including therein the clause "merchandise not to exceed 5% by weight of broken kernels"; that on said date September 8th, 1955, plaintiff informed said brokers that the sample sent by defendant was acceptable in part and non-acceptable in part due to the fact that "the broken kernels far exceeded the normal tolerance." That pursuant to the instructions of plaintiff said brokers notified defendant of the objections of plaintiff to the contract and to the sample by mail, in writing. That on September 21st, 1955, defendant notified said brokers that they were unable to comply with the demands of plaintiff in that they could not meet the requirement that the apricot kernels to be delivered under the proposed order not exceed 5% by weight of broken kernels.

5) That the two bag samples of apricot kernels received by plaintiff from defendant on or about September 8th, 1955, were not approved by plaintiff.

6) That it was intended by plaintiff and defendant that a formal written contract should be entered into between them for the purchase and sale of the apricot kernels, the order for which had been placed by said food brokers Prince, Keeler &

Co., Inc.; that no formal written contract was entered into between the parties hereto; that the formal written contract made and issued by defendant was rejected by plaintiff.

7) That defendant was engaging in the sale of apricot kernels as a new business and was totally unaware of trade custom and useage among those regularly engaged in the California apricot kernel trade; that plaintiff was well aware of this fact; that it is in dispute as to whether there existed general and well established trade custom and useage among those engaged in the California apricot kernel trade that apricot kernels in any delivery shall not contain broken kernels which shall exceed 5% by weight of any delivery, which is binding upon those engaged in said business, but it is not in dispute that defendant was totally unaware of such alleged trade custom and usage and it is further true that plaintiff in this action did not rely upon such alleged trade custom and useage to attach to a written contract, but in fact demanded of defendant that it place such condition in the formal contract that the parties intended to be executed between them.

8) That the food brokerage firm of Prince, Keeler & Co., Inc., of the City of New York, were not the agents of defendant nor were they empowered to execute on behalf of defendant a contract in writing. That Prince, Keeler & Co., Inc., of New York did not have authority in writing to bind defendant herein to any contract. That Prince,

Keeler & Co., Inc., recognized their lack of authority to act as agent for or to bind defendant and that plaintiff was aware of such fact.

9) That the claim of plaintiff herein set forth in its complaint, against defendant, is barred by Section 1724 of the Civil Code and Section 1973(a) of the Code of Civil Procedure of the State of California.

Conclusions of Law

From the foregoing Findings of Fact the Court concludes that judgment should be entered in favor of the defendant together with costs of suit incurred herein.

.....

Judge of the U. S. District Court.

Points and Authorities In Support of Motion
Rules 52 and 59, Rules of Civil Procedure.

[Endorsed]: Filed May 13, 1957.

[Title of District Court and Cause.]

ORDER STAYING EXECUTION UPON JUDGMENT

The above entitled Court having heretofore entered judgment in favor of plaintiff and against defendant in the above entitled action, and, the defendant having filed herein a Motion for New Trial and Vacation and Modification of the Findings of Fact and Conclusions of Law,

It Is Hereby Ordered that execution be stayed upon the judgment entered herein until this Court rules upon said Motion for New Trial and be further stayed for a period of ten (10) days thereafter.

Done In Open Court This 13th Day of May, 1957.

/s/ MICHAEL J. ROCHE,
Judge of the U. S. District Court.

[Endorsed]: Filed May 13, 1957.

[Title of District Court and Cause.]

STIPULATION

It Is Hereby Stipulated by and between the parties hereto, through their respective counsel, that the arguments made by both parties in the above entitled action on the 28th day of May, 1957, shall be and are to be considered by the court as arguments made both with respect to the motion of defendant for new trial and the motion of defendant for an order vacating the judgment heretofore entered on the 2nd day of May, 1957 in favor of plaintiff, and further for modifying or vacating the Findings of Fact and Conclusions of Law adopted by the trial court.

It Is Further Stipulated by and between the parties hereto that both matters have been properly submitted to the court for its determination thereof.

Dated May 28, 1957.

EISNER & TITCHELL,
/s/ By RANDALL TITCHELL,
Attorneys for Plaintiff.

/s/ RAYMOND J. O'CONNOR,
Attorney for Defendant.

[Endorsed]: Filed June 3, 1957.

[Title of District Court and Cause.]

ORDER DENYING MOTION FOR NEW
TRIAL AND MOTION TO VACATE JUDG-
MENT HERETOFORE ENTERED

The motions of defendant, Sunset-Sternau Food Co., a corporation for a new trial and for an order vacating the judgment heretofore entered in the above captioned proceeding, having come on regularly to be heard this date before the above entitled court, the matter having been orally argued to the court and having been submitted to it for decision, the court being fully advised in the premises, Now, Therefore,

It Is Hereby Ordered that the motion of defendant, Sunset-Sternau Food Co., a corporation, for a new trial is hereby denied.

It Is Further Ordered that the motion of defendant, Sunset-Sternau Food Co., a corporation, for an order vacating the judgment heretofore entered in the above captioned proceeding, and further requesting the court to modify or vacate its Findings of Fact and Conclusions of Law is hereby denied.

Done in open court this 28th day of May, 1957,
and signed this 3rd day of June, 1957.

/s/ MICHAEL J. ROCHE,
United States District Judge.

[Endorsed]: Filed June 3, 1957.

[Title of District Court and Cause.]

ORDER STAYING EXECUTION UPON JUDGMENT

The above entitled Court, having heretofore entered judgment in favor of plaintiff and against defendant in the above entitled action, and the defendant having filed herein a notice of appeal,

It Is Hereby Ordered that execution be stayed upon the judgment entered herein for a period of ten (10) days from this date.

Done In Open Court This 5th Day of June, 1957.

/s/ MICHAEL J. ROCHE,
Judge of the U. S. District Court.

[Endorsed]: Filed June 6, 1957.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that Sunset-Sternau Food Co., a corporation, the defendant above named, hereby appeals to the United States Circuit Court of Appeals, Ninth Circuit, from the final

judgment entered in this action on the 2nd day of May, 1957.

/s/ RAYMOND J. O'CONNOR,
Attorney for Defendant and Appellant Sunset-
Sternau Food Co., a corporation.

[Endorsed]: Filed June 6, 1957.

[Title of District Court and Cause.]

ORDER STAYING EXECUTION UPON JUDGMENT

The above entitled Court, having heretofore entered judgment in favor of plaintiff and against defendant in the above entitled action, and the defendant having filed herein a notice of appeal,

It Is Hereby Ordered that execution be stayed upon the judgment entered herein for a period of ten (10) days from this date.

Done In Open Court This 26th Day of June, 1957.

/s/ MICHAEL J. ROCHE,
Judge of the U. S. District Court.

[Endorsed]: Filed June 26, 1957.

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO DOCKET RECORD AND STAYING EXECUTION

It Is Hereby Ordered that Sunset-Sternau Food Co., a corporation, defendant and appellant, be

and it is hereby granted an extension of fifty (50) days from the date hereof to docket the record on appeal, and

It Is Further Ordered that execution on the judgment heretofore rendered herein be and the same is hereby stayed for a period of ten (10) days from the date hereof.

Dated this 16th day of July, 1957.

/s/ MICHAEL J. ROCHE,
Judge of the U. S. District Court.

[Endorsed]: Filed July 16, 1957.

[Title of District Court and Cause.]

ORDER EXTENDING STAY
OF EXECUTION

It Is Hereby Ordered that execution on the judgment heretofore rendered herein be and the same is hereby stayed for a period of ten (10) days from the date hereof.

Dated this 26th day of July, 1957.

/s/ LOUIS E. GOODMAN,
Judge of the U. S. District Court.

[Endorsed]: Filed July 26, 1957.

[Title of District Court and Cause.]

UNDERTAKING ON APPEAL AND TO STAY EXECUTION

Whereas, the defendant in the above entitled action has appealed to the United States Circuit Court of Appeals, Ninth Circuit, from a judgment made and entered against it in said action in the United States District Court, Southern Division, Northern District, in favor of plaintiff in said action on the 2nd day of May, 1957, for \$37,500.00 plus interest at seven (7%) per cent and costs of suit; and,

Whereas, the defendant is desirous of staying the execution of said judgment so appealed from.

Now, Therefore, in consideration of the premises, and of such appeal, the undersigned American Casualty Company of Redding, Pennsylvania, a corporation, duly organized and existing under the laws of the State of Pennsylvania, and duly authorized to transact a general surety business in the State of California, does hereby undertake and promise, on the part of defendant and does acknowledge itself justly bound in the sum of \$42,000.00 that if the said judgment appealed from, or any part thereof, be affirmed, or the appeal be dismissed, the defendant will pay the amount directed to be paid by the judgment or order, or the part of such amount as to which the same shall be affirmed, if affirmed, only in part, and all damages and costs which may be awarded against the de-

defendant upon the appeal and that if the defendant does not make such payment within thirty (30) days after the filing of the remittitur in the Court from which the appeal is taken, judgment may be entered in such action on motion of plaintiff (and without notice to the undersigned surety) in his favor against the said surety for such amount, together with the interest that may be due thereon, and the damages and costs which may be awarded against the defendant upon the appeal,

And Further, it is expressly understood and agreed that in case of a breach of any condition of the above obligation, the Court in the above entitled matter may, upon notice to defendant of not less than ten (10) days, proceed summarily in the action or suit in which the same was given to ascertain the amount which said surety is bound to pay on account of such breach, and release judgment therefor against it and award execution therefor.

In Witness Whereof, the corporate seal and name of the said surety company is hereby affixed and attested at San Francisco, California, by its duly authorized officer this 12th day of August, 1957.

[Seal] AMERICAN CASUALTY COMPANY OF REDDING, PENNSYLVANIA, a corporation,

/s/ By F. W. TROTTER,
Attorney-in-Fact.

The foregoing bond is approved both as to form and sufficiency of surety.

Dated: August 12th, 1957.

/s/ LOUIS E. GOODMAN,
Judge of the U. S. District Court.

Acknowledgment of Service Attached.

Notary Certificate Attached.

[Endorsed]: Filed Aug. 12, 1957.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, hereby certify the foregoing and accompanying documents and exhibits, listed below, are the originals filed in this Court in the above-entitled case and constitute the record on appeal herein as provided in the Federal Rules of Civil Procedure: Except Defendant's Exhibit A which does not appear in our files:

Excerpt from Docket Entries.

Complaint.

Acknowledgment of Service and Entry of Appearances.

Answer of Defendant to Complaint.

Motion of Plaintiff for Production and Inspection of Documents.

Affidavit of Plaintiff in Support of Motion for Production and Inspection.

Interrogatories by Plaintiff to Defendant.

Answer of Defendant to Interrogatories by Plaintiff.

Approval as to Form of Findings of Fact, Conclusions of Law and Judgment, by Defendant.

Findings of Fact and Conclusions of Law.

Judgment.

Motion of Defendant for New Trial.

Order Staying Execution upon Judgment.

Stipulation of Parties that Arguments be Considered as Having Been Made to Both Motion for New Trial and Motion to Vacate Judgment.

Order Denying Motion for New Trial and Motion to Vacate Judgment.

Order Staying Execution upon Judgment.

Notice of Appeal.

Order Staying Execution upon Judgment.

Order Extending Time to Docket Record on Appeal and Staying Execution.

Order Extending Stay of Execution.

Undertaking on Appeal and to stay Execution.

Reporter's Transcript of Proceedings Feb. 21, 25, 26 and Mar. 25, 1957.

Plaintiff's Exhibits 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, and 46.

Defendant's Exhibits B and C.

In Witness Whereof I have hereunto set my hand

and affixed the seal of said District Court this 27th day of August, 1957.

[Seal]

C. W. CALBREATH,
Clerk,

/s/ By MARGARET P. BLAIR,
Deputy Clerk.

[Title of District Court and Cause.]

STATEMENT OF POINTS ON APPEAL

Defendant-appellant herewith presents the points upon which it contends that the District Court erred as follows:

1. The Court erred in finding as a fact that there was a contract in writing entered into between plaintiff and defendant which formed the basis of plaintiff's case.

2. That the Court erred in finding as a fact that a contract was entered into between plaintiff and defendant on or about September 1, 1955.

3. That the Court erred in finding as a fact that a written memorandum of sale issued by a broker constituted a contract between the plaintiff and defendant herein.

4. That the Court erred in finding as a fact that plaintiff approved a sample of apricot kernels submitted by defendant to plaintiff.

5. That the Court erred in finding as a fact that defendant confirmed the sale orally and in writing, recognized and ratified said contract, and in further finding that defendant ratified the authority of the

broker in executing the memorandum of sale on behalf of defendant.

6. That the Court erred in finding that there was a trade custom and usage of those engaged in the business of selling apricot kernels and that said trade custom and usage was part of the alleged contract of sale between plaintiff and defendant herein.

7. That the Court erred in finding as a fact that the parties to this action did not intend that the existence of a contract should be dependent upon execution of a formal contract and that the broker's memorandum constituted a contract between the parties.

8. That the Court erred in finding as a fact that defendant promised and assured plaintiff it would make delivery of said contract, to wit, the broker's memorandum, and that plaintiff relied upon the promises and assurances of defendant of delivery under the memorandum to its detriment; that the Court erred in finding as a fact that defendant for the first time refused to make delivery on November 16th, 1955; that the Court erred in finding as a fact that defendant by its conduct is estopped to rely upon the Statute of Frauds as a defense and is estopped to deny the existence of the contract.

9. That the Court erred in finding as a fact that plaintiff complied with all the terms and conditions of said alleged contract, to wit, the broker's memorandum, and that defendant failed and refused to perform on its part.

10. That the Court erred in finding as a fact

that it is not true that the Complaint failed to state a claim against the defendant and in further finding that it is not true that plaintiff's cause of action was barred by Section 1724 of the Civil Code or Section 1973 (a) of the Code of Civil Procedure of the State of California.

11. That the Court erred in admitting evidence of trade usage and custom as part of plaintiff's case and in finding that said trade usage and custom became and was a part of the alleged contract between the parties hereto as evidenced by the broker's memorandum of September 1, 1955.

12. That the Court erred in excluding evidence offered by defendant that plaintiff had knowledge of the fact that defendant would not accept the broker's memorandum of sale of the kind involved in this case as a contract between the parties and that plaintiff knew that defendant only recognized orders for purchase which were reduced to a formal contract of defendant to be executed by both parties to the transaction.

13. That the Court erred in entering judgment for plaintiff.

14. That the Court erred in refusing to adopt the Findings of Fact and Conclusions of Law submitted by defendant and appellant.

/s/ RAYMOND J. O'CONNOR,
Attorney for Defendant and
Appellant.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed Aug. 27, 1957.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO SUPPLEMENTAL RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, hereby certify the foregoing and accompanying documents, listed below, are the originals filed in this Court in the above-entitled case and constitute the supplemental record on appeal herein as designated by the counsel for appellant:

Appellant's Designation of Record on Appeal.

Statement of Points Upon Which Appellant Intends to Rely on Appeal.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court this 27th day of August, 1957.

[Seal] C. W. CALBREATH,
Clerk,

/s/ By MARGARET P. BLAIR,
Deputy Clerk.

In the United States District Court, Northern
District of California, Southern Division

No. 35,103

AMERICAN ALMOND PRODUCTS COM-
PANY, INC., Plaintiff,

vs.

SUNSET-STERNAU FOOD COMPANY, a cor-
poration, et al., Defendants.

REPORTER'S TRANSCRIPT

February 21st, 1957

Before: Hon. Michael J. Roche, Judge.

Appearances: For the Plaintiff: Messrs. Eisner
& Titchell, represented by Norman A. Eisner, Es-
quire. For the Defendants: Raymond J. O'Connor,
Esq. [1]*

The Clerk: American Almond Products versus
Sunset-Sternau Food Company; pre-trial confer-
ence and trial.

Mr. Eisner: Ready.

Mr. O'Connor: Ready, your Honor.

The Court: I don't know whether you gentlemen
are familiar with our new order of things here. We
are supposed to have a pre-trial conference in all
these matters.

Is there any prospect of a settlement in this
case?

* Page numbers appearing at top of page of Reporter's Tran-
script of Record.

Mr. O'Connor: I would say no, your Honor.

Mr. Eisner: I think that is true.

The Court: Now, is there anything in regard to Amendments to Pleadings?

Mr. O'Connor: As far as amending the Answer is concerned, I would ask leave of the Court at this time that Paragraph 4 of the Answer on file be amended on its face at line 15. Section 1973 is cited. It should be Section 1973(a) of the Civil Code of Procedure.

The Court: No objection?

Mr. Eisner: No objection.

The Court: Limitation of Expert Witnesses. Do we have any difficulty in this case?

Mr. Eisner: We shall have, I believe, two expert witnesses.

The Court: One won't be sufficient for your case?

Mr. Eisner: We would just limit it to two. [2]

The Court: What about you?

Mr. O'Connor: None, your Honor.

The Court: Is there any way we can simplify the issues in this case?

Mr. O'Connor: I have this suggestion, if the Court please: The question, as I see it, in this case resolves itself into the primary question, was there a contract? And on the determination of that question would be the question of whether there were any damages?

The Court: Written or oral?

Mr. Eisner: Written contract, if the Court

please. They plead the Statutes of Frauds but we claim there is compliance and ramification also.

Mr. O'Connor: We claim, on the other hand, if the Court please, that there was not at any time a contract, written or oral, in addition to citing the Statute of Frauds in the matter.

The Court: Admissions of fact in relation to the documents that are to be presented here in this case.

Mr. Eisner: The documents for the most part, if the Court please, are included in the deposition that has been taken and the documents are identified which I propose to read into the record.

The Court: Produce them now and we will mark them for purposes of identification. [3]

Mr. Eisner: They are photostatic copies.

The Court: No objection to the photostatic copies?

Mr. O'Connor: No objection to the photostatic copies, your Honor.

Mr. Eisner: Then the documents have already been identified in the deposition as 1 for Identification through 32, and we ask that they be marked in the same order.

The Court: No objection?

Mr. O'Connor: No objection.

The Court: So ordered.

The Clerk: Plaintiff's Exhibits 1 through 32 marked for Identification.

The Court: Are those all the documents?

Mr. Eisner: There may be a few letters that will be introduced in conjunction with the testimony.

The Court: So we make no mistake about the letters, produce them now so counsel has an opportunity to examine them.

Mr. Eisner: Most of these documents are already included in the deposition and I would want the witness to have copies of them or show them to counsel.

The Court: He will show you his copies, if any.

Mr. O'Connor: I have several documents here, your Honor.

(Counsel examining documents.)

The Court: Are there any stipulations that you can enter into? [4]

Mr. Eisner: It seems to me there is one: An allegation of non-delivery. I suppose we can stipulate to that. There has been no delivery under the contract.

Mr. O'Connor: That's right; beyond two samples.

Mr. Eisner: Yes.

The Court: Is there anything else that you gentlemen have in mind that I can assist you with?

Mr. Eisner: I don't think so. Demand for delivery was alleged, but that all appears in the deposition.

The Court: You have heard a great deal about pre-trial conferences.

Mr. Eisner: Yes, we have, if the Court please.

Mr. O'Connor: Yes, your Honor.

The Court: As I remember it, you had many cases before me when I was in the State Court.

Mr. Eisner: I did. I had the pleasure.

The Court: We didn't belabor it, but we did everything we did this morning, didn't we?

Mr. Eisner: Yes, we did. Nothing new. I will say this, if the Court please: I don't think either of us thought, by reason of the simplicity of the issues here and the diversity of ideas, that a pre-trial conference would have been of real service, so that was the reason——

Mr. O'Connor: No, it would not have been.

Mr. Eisner: That was the reason we did not ask for a [5] pre-trial conference.

The Court: It is just as well you didn't, because we could dispose of this matter in a very few minutes and save you a lot of work.

Proceed now, gentlemen.

Mr. Eisner: If the Court please, I would like to read the deposition. This deposition was taken pursuant to stipulation and the usual stipulation that all objections to questions, other than to the form of the question, were reserved. The examination was by myself of Mr. Sternau, Mr. Sydney Sternau.

DEPOSITION OF SYDNEY STERNAU

"Q. (By Mr. Eisner): Mr. Sternau, you are the president, I believe, of the Sternau Food Company—The Sunset-Sternau Food Company?

"A. Yes.

"Q. That is a corporation? A. Yes."

Just to interrupt regarding stipulations, counsel and I have agreed that so far as the corporate existence of the two parties, the corporate existence is admitted.

(Deposition of Sydney Sternau.)

Mr. O'Connor: That is correct, your Honor.

Mr. Eisner: The plaintiff being a corporation organized under the laws of the State of New York, and the defendant under the laws of the State of California.

"Q. A California corporation? A. Yes.

"Q. What business is it engaged in?

"A. Food processing.

"Q. Primarily nuts?

"A. Primarily nuts. [5-A-1]

"Q. And what nuts do you deal in?

"A. Almonds, walnuts, filberts, brazils and pecans, shelled and not shelled, shelled and in the shell.

"Q. And the company has a processing plant, has it? A. Yes.

"Q. One, or more than one?

"A. More than one.

"Q. Where are they located?

"A. Modesto.

"Q. And how many years has the company been in business?

"A. Let me see—56 years, I believe is correct.

"Mr. O'Connor: It was incorporated in 1922.

"Q. (By Mr. Eisner): You market your products throughout the United States, do you?

"A. Yes.

"Q. And you have brokers through whom you deal? A. Yes.

"Q. And is Prince, Keeler & Co., Inc. of New York one of your brokers? A. They are.

(Deposition of Sydney Sternau.)

“Q. How long has Prince, Keeler & Co., Inc. of New York been acting as a broker for the Sunset-Sternau Food Company?

“A. Six years, approximately — approximately six years.

“Q. And this concern of Prince, Keeler & Co., Inc. acts as your broker and sells for Sunset-Sternau Food Company, the products that you market in the State of New York and its vicinity?

“A. They operate as a sales broker only. [5-A-2]

“Q. As a sales broker?

“A. Yes, in New York City and Brooklyn and the vicinity of New York—Metropolitan New York is better.

“Q. About what volume of business does Prince, Keeler & Co., Inc. handle for Sunset-Sternau Food Company in a year?

“A. I couldn't tell you.

“Q. Well, does it run into a large quantity?

“A. I don't know what the figures are—the exact figures.

“Q. What are the approximate figures?

“A. I don't know the approximate figures.

“Q. Well, do they sell for you—and when I say “you” I mean the Sunset-Sternau Food Company—the various products that you market in the State of New York and its vicinity? A. Yes.

“Q. In July, 1955, were you in New York?

“A. I don't believe so; I am not sure of the date; I know I was in New York in July, but I am not sure of the date, for certain.

(Deposition of Sydney Sternau.)

“Q. I didn’t ask you any particular date; in July? A. I was in July, yes.

“Q. Do you know a Mr. Astrack? A. Yes.

“Q. Who is Mr. Astrack?

“A. A salesman with Prince, Keeler & Co.

“Q. In July, 1955, did you and Mr. Astrack call upon [5-A-3] the American Almond Products Company in New York? A. Yes.

“Q. And whom did you see there?

“A. I think Mr. Kaplan.

“Q. When you and Mr. Astrack of Prince, Keeler & Co., Inc. called on Mr. Kaplan, did you tell Mr. Kaplan that Sunset-Sternau Food Company had apricot kernels that it offered for sale?

“A. We told them that we thought we would have some apricot kernels for sale.

“Q. Did you tell him what quantity you had for sale?

“A. We didn’t know at that time the quantity.

“Q. You didn’t mention any quantity?

“A. I don’t believe so, at that time.

“Q. Did you tell him that your price would be that of your competitors?

“A. We told him, I think, that we would be competitive.

“Q. Had you ever sold apricot kernels before?

“A. No.

“Q. How did you happen to offer apricot kernels for sale at this time?

“A. Because we have always had apricot kernels—apricots—in the shell, that we have from our

(Deposition of Sydney Sternau.)

cannery operations, and we always sell them to this man Bonzi, and we approximately had 150 wet tons of our own of them, and [5-A-4] Bonzi approached us to work together and try to sell them with him; that is how we offered them.

“Q. In other words, if I understand you correctly, you had about how many—150 tons.

“A. 150 tons of wet kernels.

“Q. And did Mr. Bonzi have other wet kernels?

“A. Yes, Mr. Bonzi made it a business to dry kernels.

“Q. Is Mr. Bonzi in the business of buying the refuse from canneries? A. Yes.

“Q. And in that way he gets apricot pits, does he? A. Yes.

“Q. So, prior to your trip to New York, then, you had made some arrangement with Mr. Bonzi whereby you were going to sell apricot kernels, is that correct? A. Yes, that is correct.

“Q. I show you this letter and ask you if it is a photostatic copy of a letter that you received from Prince, Keeler & Co., Inc.

“Mr. O'Connor: We can shorten this up, Mr. Eisner; that is calling for his independent recollection; I can show him, in some of these instances, we have the original letters in our file, and those are the ones that you have been supplied to you upon request, I think we can agree on some of these questions that these are correct photostatic copies.

“Mr. Eisner: Will it be stipulated that this letter [5-A-5] dated July 25, 1955, is a photostatic

(Deposition of Sydney Sternau.)

copy of the original of a letter received by the Sunset-Sternau Food Company from Prince, Keeler & Co., Inc.?

“Mr. O’Connor: Yes, here is the original; there is no question about it.

“Mr. Eisner: We offer this as plaintiff’s exhibit No. 1 for identification.”

We now offer Exhibit No. 1 in evidence.

The Court: It will be admitted and marked.

Mr. Eisner: In order that the Court may be familiar with the development, I would like to read it into the record. This is a letter on the letterhead of Prince, Keeler & Co., Inc., Manufacturer’s Representative, July 25, 1955, addressed to Sunset-Sternau Food Company, Modesto, California.

(Whereupon the letter referred to was read in its entirety by Mr. Eisner.)

(Reading of deposition continued as follows.)

“Q. (By Mr. Eisner): Now, Mr. Sternau, this letter says, dated July 25, 1955:

‘Last week Mr. Sternau with Mr. Astrack of this office, called on American Almond Products Co., Inc. with the view to selling them Apricot Kernels.’

Is that correct? A. That is correct.

“Q. It further states:

‘This morning we had a call from Mr. Kaplan of [5-A-6] American Almond, asking the following questions:

1. Can you ship him by Railway Express imme-

(Deposition of Sydney Sternau.)

diately 200 lbs. of these Apricot Kernels, which he needs for a test run in his laboratory?

2. Are these Apricot Kernels, that is the 75 tons, available for prompt shipment, or for shipment in 30 days, or just when they will be available.'

I will ask you if in this conversation with Mr. Astrack and with Mr. Kaplan you offered Mr. Kaplan of American Almond Products 75 tons of the apricot kernels?

"A. Yes, that is correct.

"Q. And Mr. Kaplan wanted to know—reading from the letter:

'3. Mr. Kaplan wanted to know if he requested, say, 30/50 tons in August, would you be in a position to ship at that time?

Would you give us your best estimate as to when these kernels will be ready, and in the meantime get off the 200 lbs. to Mr. Kaplan at the following address:

American Almond Products Co., Inc., 103
Walworth Street, Brooklyn, New York.

Your prompt cooperation on the above will be appreciated.'

"Q. Now, then, Mr. Sternau, did you reply to that [5-A-7] letter, as far as you can recall?

"A. I don't recall.

"Q. I show you this document—that is not one from Mr. O'Connor's file, but it is certified by Mr. Sullivan as being a copy of the letter which was mailed——

(Deposition of Sydney Sternau.)

“Mr. O’Connor: That is one of those letters which you told me of?

“Mr. Eisner: Yes, one which you apparently could not produce.

“Q. Do you recognize that?

“A. No, I don’t remember the letter.

“Q. You don’t remember the letter after reading it? A. No.

“Q. I will ask you, did you send this letter?

“A. I don’t remember sending it—it is not under our letterhead, and I don’t remember it.

“Q. (By Mr. O’Connor): In other words, you haven’t any independent recollection of sending it?

“A. Yes, I could have sent it, but I have no recollection of sending it.

“Mr. Eisner: Are you willing to stipulate that this is a copy of a letter that is certified as a true copy by Frank L. Sullivan—

“Q. Do you know Frank L. Sullivan? Who is he?

“A. A salesman for Prince, Keeler & Co., Inc.

“Q. Is he an officer of Prince, Keeler & Co., Inc.? [5-A-8]

“A. I couldn’t tell you that—he is a salesman from Prince, Keeler & Company.

“Q. Did you notice that it is certified under his signature as correct—do you recognize his signature?

“Mr. O’Connor: I have a letter with his signature right; apparently that is his signature, counsel.

“Mr. Eisner: Will you stipulate, counsel, that

(Deposition of Sydney Sternau.)

this is a copy of a letter by the Sunset-Sternau Food Company to Prince, Keeler & Co., Inc.?

Mr. O'Connor: I will stipulate that this is a certification by Frank L. Sullivan, but we don't have the original of the letter, and apparently not a copy of the letter, so I am not going to be able to stipulate to it; I assume that Prince, Keeler & Company have the original letter.

"Mr. Eisner: Certainly Prince, Keeler & Company has the original of the letter, and made this copy and certified to it as correct; I have shown it to the witness, and after this conversation, neither the witness is willing to identify it, nor are you willing to stipulate that it is a copy of a letter that was sent.

"Mr. O'Connor: I am not in a position to do so.

"Mr. Eisner: We will offer this in evidence for identification.

"(Thereupon the document referred to was marked as Plaintiff's Exhibit No. 2 for identification.)" [5-A-9]

Mr. Eisner: Now, I will say that thereafter a request was made of counsel to admit the genuineness of this letter, and counsel has in writing admitted the genuineness of the letter.

Mr. O'Connor: Yes. There is a stipulation on file.

Mr. Eisner: So we offer the letter in evidence as plaintiff's Exhibit No. 2.

The Court: So ordered.

(Whereupon the certified copy of letter re-

(Deposition of Sydney Sternau.)

ferred to was admitted in evidence as Plaintiff's Exhibit No. 2.)

Mr. Eisner: This letter is dated August 22, 1955, Prince, Keeler & Company, 99 Hudson Street, New York, New York, Attention: Mr. William Berke.

Mr. O'Connor: May I interrupt at this time? It may save some time, counsel. There are a few of these letters, your Honor, which are rather lengthy and they have paragraphs relating to the issues in this case. In this particular letter I notice the fourth paragraph is the only paragraph referring to the matter at issue before the Court, and we can shorten it up.

Mr. Eisner: I appreciate your suggestion, but I think, rather than try to pick it up, the documents are not long; I think it would be easier to just read them in as they are.

Mr. O'Connor: There are quite a few lengthy letters here.

The Court: If he takes the position he wants them all read, [5-A-10] he is entitled to it under the law.

Mr. O'Connor: I was trying to shorten it up, your Honor.

Mr. Eisner: It won't take long.

The Court: Very well.

(Whereupon Mr. Eisner read the letter in its entirety and then continued as follows with the reading of the deposition.)

"Q. (By Mr. Eisner): I notice in this letter,

(Deposition of Sydney Sternau.)

which has been marked Plaintiff's Exhibit No. 2 for identification, Mr. Sternau, that it states:

'We hope to be able to ship the 200 pounds of Almond Pits some time this week to American Almond Products.'

I will ask you, when it says 'almond pits', is that a misnomer, and does it refer to apricot pits or apricot kernels?

"A. It could; we couldn't call them almond pits.

"Q. Is there any such thing as almond pits?

"A. Not that I know of, no.

"Q. And this letter of August 22nd purports to be a letter in response Exhibit No. 1 for identification; I notice that it states in this letter:

'Please keep us advised if you hear any opening prices anywhere on Apricot Kernels, as we told American Almond Products that our price will be no higher than our competitors.' [5-A-11]

Is that what you told Mr. Kaplan when you had that conversation with him? A. We did.

"Q. 'As this is a new item for us and there are only a few buyers in the country, we certainly hope to be able to sell our whole output in the Metropolitan New York market.'

Is that correct? A. Yes, that is correct.

"Q. As I understand it, Prince, Keeler & Co., Inc., was your representative in the New York market?

"A. They are our brokers in the New York market.

"Mr. O'Connor: Let me make a statement for

(Deposition of Sydney Sternau.)

the record: Mr. Eisner, you and I will get along a little better if you will drop that accusatory tone in your voice here.

“Mr. Eisner: I don’t mean to have an accusatory tone, but I am a little disconcerted, frankly, that a letter which obviously was written by the witness is refused to be identified; you can make your own deduction, but I am not——

“Mr. O’Connor: Personally, I don’t care what you think; I will stipulate to anything which is obvious; I just don’t so happen to have that letter in our files; it might be lost in the other file; any assumption by you, frankly, I am not concerned with, but I am concerned with this; in the taking of a deposition I don’t understand that it is necessary to get into any personalized feelings or to use an accusatory tone of voice, and I frankly won’t stand for it; you can ask the question on any matters of fact and I will [5-A-12] not object to those at all.

“Mr. Eisner: Well, we will get along.”

Mr. O’Connor: Thereupon the accusatory tone ceased, your Honor.

The Court: They are still good friends, are they?

Mr. Eisner: I don’t think I ever used any accusatory tones.

The Court: Knowing Mr. Eisner as well as I do for 40 years, I don’t think we will have any trouble at all.

“Q. Now, Mr. Sternau, I show you what purports to be a photostatic copy or a letter dated August 24, 1955, and ask you if you will identify it as

(Deposition of Sydney Sternau.)

a photostatic copy of a letter which you received from Prince, Keeler & Co., Inc.?

"A. Yes.

"Mr. Eisner: We offer this as next in order.

"(Thereupon the document referred to was marked as Plaintiff's Exhibit No. 3 for identification.)"

Mr. Eisner: We offer it in evidence as Exhibit No. 3.

The Court: So ordered.

(Whereupon letter dated August 24, 1955, Prince, Keeler & Co., Inc. to Mr. S. M. Sternau was received in evidence as Plaintiff's Exhibit No. 3.)

Mr. Eisner: I will read the letter. It is a letter on the letterhead of Prince, Keeler & Co., Inc., dated August 24, 1955, addressed to Mr. S. M. Sternau, Sunset-Sternau Food Co., Modesto, California:

(Whereupon the letter referred to was read into the record by Mr. Eisner.)

"Q. (By Mr. Eisner): Mr. Sternau, I notice in this letter that it starts out:

'We have your letters of August 22nd.'

Now, I will ask you again, in view of the statement in this letter, that 'we have your letters of August 22nd', whether or not you can identify Plaintiff's Exhibit No. 2 for identification as a copy of a letter written by you?

"A. No, I don't identify it.

"Q. Do you have any independent recollection of that letter?

(Deposition of Sydney Sternau.)

“A. No; if I had any independent recollection, I would say yes, but I just don’t.

“Q. I notice in this letter, which has been marked Plaintiff’s Exhibit No. 3 for identification, that Prince, Keeler & Co., Inc., writes:

‘Certainly pleased to hear you are shipping American Almond 200 lb. Almond Pits——’

That, again, Mr. Sternau, refers to apricot kernels and not almond pits?

“Mr. O’Connor: I think we can agree on that.

“Mr. Eisner: That is what he said.

“Mr. O’Connor: It is obviously an error.

Mr. Eisner: ‘Hope you are holding this stock for us [5-A-14] till we are able to report to you on same. Up to date your competitors have still not named a price—as soon as we hear prices, will contact you. You still have not advised us how much of this merchandise is available and when you will be able to make shipment after goods are approved. Kindly let us have this information so we can be guided accordingly.’

“Q. Did you make any reply to that letter, Mr. Sternau, prior to August 26, 1955, at the time that you wrote a letter bearing that date?

“Mr. O’Connor: Will you read that last question?

“(Record read by the Reporter.)

“Mr. O’Connor: And Mr. Eisner has submitted a photostat of a letter of August 26 to the witness.

“The Witness: Yes, sir.

(Deposition of Sydney Sternau.)

“Q. (By Mr. Eisner): What reply did you make?

“A. I think the reply is in the letter there.

“Q. In other words, do I understand that this letter of August 26th is the only reply that you made to that letter?

“Mr. Eisner: I will offer this letter as our exhibit next in order.

“(Thereupon the document referred to was marked as Plaintiff’s Exhibit No. 4 for identification.)”

We offer it as Plaintiff’s Exhibit No. 4. [5-A-15]

The Court: So ordered.

(Whereupon letter dated August 26, 1955, S. M. Sternau to Prince, Keeler & Co., Inc., was admitted into evidence as Plaintiff’s Exhibit No. 4.)

Mr. Eisner: It is a letter dated August 26, 1955, addressed to Prince, Keeler & Co., 99 Hudson Street, New York, Attention Mr. William Berke:

(Whereupon Mr. Eisner read the letter referred to into the record. He then continued with the reading of the deposition as follows:)

“Q. (By Mr. Eisner): Now, Mr. Sternau, on August 31, did you receive this telegram from Prince, Keeler & Co., Inc.?

“Mr. O’Connor: Let the record show that I am showing the witness the original telegram, which is in my file, and of which this happens to be a photostat supplied by Mr. Eisner.

“The Witness: Yes.

(Deposition of Sydney Sternau.)

“Mr. Eisner: We offer the telegram in evidence as plaintiff’s exhibit next in order.

“(Thereupon the document referred to was marked as Plaintiff’s Exhibit No. 5 for identification.)”

Mr. Eisner: We offer this telegram as No. 5.

The Court: It may be marked.

(Whereupon telegram dated August 31, Prince, Keeler & Co. to Sunset-Sternau was received in evidence as Plaintiff’s [5-A-16] Exhibit No. 5.)

Mr. Eisner: It is a telegram dated August 31, 1955, New York, addressed to Sunset-Sternau Food Company, Modesto.

(Whereupon Mr. Eisner read the telegram into the record.)

The Court: The price opened at 17c?

Mr. Eisner: That is what it says in the telegram.

(Reading of the deposition continued.)

“Q. (By Mr. Eisner): I will ask you, Mr. Sternau, if upon the same day that you received that telegram, you replied by telegram which I am now showing youc A. Yes.

“Q. In other words, Mr. Sternau, by the wire which has been marked Exhibit No. 5 for identification, Prince, Keeler & Co., Inc. advised you that the price, according to the American Almond Products Company, was 17 cents per pound?

“A. Yes.

“Q. And you replied that you understood that the price was 18 cents and not 17 cents?

(Deposition of Sydney Sternau.)

"A. Yes.

"Mr. Eisner: I will ask that this be marked as plaintiff's exhibit next in order.

"(Thereupon the document referred to was marked as Plaintiff's Exhibit No. 6 for identification.)"

Mr. Eisner: We offer that in evidence as Plaintiff's Exhibit No. 6, and it is a telegram dated August 31, 1955, addressed to Prince, Keeler & Co., and it reads: [5-A-17]

"Apricot Kernels shipped today. We understand price is 18 cents not 17.

Sunset-Sternau Food Co."

(Reading of the deposition continued.)

"Q. (By Mr. Eisner): On the following day, September 1st, did you have a telephone conversation with Prince, Keeler & Co., Inc. about the price at which Sunset-Sternau Food Company would see or offer the apricot kernels to the American Almond Products Company?

"A. I don't remember.

"Q. You have no recollection of the conversation? A. No.

"Q. I show you this letter of September 1, 1955, and ask if you recognize it as a letter received by you from Prince, Keeler & Co., Inc.?

"Mr. O'Connor: So I won't have to repeat this, in any of these cases where you are using the exhibits previously supplied to you, I am showing them to the witness so that he can make an easy identification.

(Deposition of Sydney Sternau.)

“Mr. Eisner: I have no objection to that.

“Q. While we are referring to that, the letter that you have not identified, that of August 22, 1955, you have not found any letters of that date in your file? A. No.

“Mr. O'Connor: No, we don't have a copy of that letter; [5-A-18] I presume the original is with Prince, Keeler & Company; if it is, I will check that myself; it undoubtedly is.

“Mr. Eisner: It must be, because Prince, Keeler & Co. had the copy of it.

“The Witness: The letter was received by the Company, not by me.

“Mr. Eisner: When I refer to you, I am referring to the Company, Sunset-Sternau Food Company.

“Mr. O'Connor: Let the record show that this particular communication is addressed to Mr. Steve Tarrico, Sunset-Sternau Food Company.

“Q. (By Mr. Eisner): Who is Steve Tarrico?

“A. He is a member of the Company, an officer of the Company, a vice-president.

“Q. Now, referring to this letter which we now offer for identification, and which I will ask be marked, this letter says: (Reading letter.)

Is it a fact, Mr. Sternau, that in the telephone conversation of September 1, 1955, the price of 17½ cents was authorized to Prince, Keeler & Co., Inc. to quote to the American Almond Products Company?

“Mr. O'Connor: If you know, Mr. Sternau.

(Deposition of Sydney Sternau.)

“A. (By the Witness): No, I was not in the office at that time.

“Mr. O’Connor: I call your attention to this, counsel; [5-A-19] obviously it was a conversation with Tarrico, not with Mr. Sternau.

“Mr. Eisner: I realize that; in this letter of September 1, 1955, it is stated in this letter ‘with regard to shipping and packing—this is designated on enclosed contract which we believe will meet with your approval.’

“Mr. O’Connor: Has that letter been identified yet?

“(Thereupon the document referred to was marked as Plaintiff’s Exhibit No. 7 for identification.)”

Mr. Eisner: We offer it in evidence as Exhibit No. 7.

The Court: It may be admitted and marked.

(Whereupon letter September 1, 1955, Prince, Keeler & Co., Inc., to Mr. Steve Tarrico was admitted in evidence as Plaintiff’s Exhibit No. 7.)

Mr. Eisner: It is on the letterhead of Prince, Keeler & Co., addressed to Steve Tarrico, Sunset-Sternau Food Company, Modesto, California.

(Whereupon Mr. Eisner read the letter into the record.)

(Continuing with reading of the deposition.)

“Q. (By Mr. Eisner): Now, I show you this document, and ask you whether that is the contract that was—— A. No, sir.

(Deposition of Sydney Sternau.)

“Q. Was that document enclosed with this letter?

“A. It probably was—I don’t know—but that is not [5-A-20] the contract.

“Q. That was the document that was enclosed in the letter?

“A. I couldn’t tell you; I didn’t open the mail; I was not in the office.

“Mr. Eisner: Will it be stipulated that this is the document produced from your files——

“Mr. O’Connor: Yes, that is correct.

“Mr. Eisner: ——that was enclosed with that letter?

“Mr. O’Connor: Obviously it was the enclosure with this letter, yes.

“Mr. Eisner: I will ask that it be marked.

“(Thereupon the document referred to was marked as Plaintiff’s Exhibit No. 8 for identification.)”

Mr. Eisner: We offer in evidence this document as Plaintiff’s Exhibit next in number.

The Court: It may be admitted and marked.

(Whereupon Plaintiff’s Exhibit No. 8 for identification was received in evidence as Plaintiff’s Exhibit No. 8.)

Mr. Eisner: This is on the heading of Prince, Keeler & Co., Inc. It is given a number 9-12079, dated 9-1-55. (Whereupon Mr. Eisner read the document into the record.)

(Reading of deposition continued.)

“Q. (By Mr. Eisner): Now, Mr. Sternau, upon

(Deposition of Sydney Sternau.)

September 6, 1955, was this document prepared in your office? [5-A-21]

"A. Yes.

"Q. How many copies of that were prepared?

"A. Three.

"Q. Do you have the three copies?

"A. Yes.

"Q. May I see them, please?

"Mr. O'Connor: These, I think, were supplied to you, counsel.

"Mr. Eisner: Just one was supplied to me; I would like to see the three of them.

"Q. Now, Mr. Sternau, did you send the three copies of this document to Prince, Keeler & Co., Inc.?"

"A. Yes.

"Mr. Eisner: I will ask that this be marked as our exhibit next in order.

"(Thereupon the document referred to was marked as Plaintiff's Exhibit No. 9 for identification.)"

Mr. Eisner: We offer this as Exhibit No. 9.

The Court: It may be admitted and marked.

(Whereupon the contract referred to was marked Plaintiff's Exhibit No. 9 in evidence.)

Mr. Eisner: This is on Sunset-Sternau Food Company heading, dated September 6, 1955, and it is a sales contract.

(Whereupon Mr. Eisner read the document into the record.)

Mr. O'Connor: I don't think it is necessary to

(Deposition of Sydney Sternau.)

read it entirely, the conditions on the back of the document. [5-A-22]

Mr. Eisner: It is not photostated here.

Mr. O'Connor: If that is the case, then I would offer, if the Court please, instead of the photostat in this case, the complete document. They are made out in triplicate and they do have conditions on the back.

Mr. Eisner: I have no objection to the substitution of the three documents that counsel is producing, of which the other was a photostatic copy.

Mr. O'Connor: Fine. Then it would be stipulated, too, counsel, that this document was never executed?

Mr. Eisner: That is right.

The Court: Defendant's Exhibit A.

The Clerk: Defendant's Exhibit A admitted and filed in evidence.

(The documents referred to were admitted in evidence as Defendant's Exhibit A.)

(Continuing with reading of deposition.)

"Q. (By Mr. Eisner): When you sent this document to Prince, Keeler & Co., Inc., you sent it in triplicate, did you? A. Yes.

"Q. Did you write any letter when you sent it?

"A. Generally, a form letter goes with it.

"Q. Did any form letter go in this instance?

"A. They always go.

"Q. I have asked for the production of any document [5-A-23] that was sent with this letter; do you have any copy of any document that was

(Deposition of Sydney Sternau.)

sent with this letter? Do you have any copy of any document that accompanied this?

"A. Yes, we probably have it in our contract file—we will look.

"Mr. O'Connor: I don't have it, Mr. Eisner; if a form letter was sent, apparently there are no copies—I will check.

"Q. (By Mr. Eisner): When you sent——

"Mr. O'Connor: May it be understood, Mr. Eisner, that when you say 'you' sent it, that does not imply that Mr. Sternau himself sent the documents?

"Mr. Eisner: When I say 'you,' I am referring to the Company; I don't assume that Mr. Sternau attends to all of the details.

"Q. (By Mr. O'Connor): Do you personally send these out?

"A. Never—never see the form letter, either.

"Q. (By Mr. Eisner): Now, Mr. Sternau, did Sunset-Sternau Food Company send 200 pounds of apricot kernels to American Almond Products Company?

"A. I believe they were shipped by Mr. Bonzi.

"Q. Did you tell Mr. Bonzi to ship the apricot kernels to American Almond Products?

"A. I personally didn't tell him, but probably he was told to ship them to the American Almond Products. [5-A-24]

"Q. Mr. Sternau, I call your attention to the telegram which has been marked Plaintiff's Exhibit No. 6 for identification, in which it is stated

(Deposition of Sydney Sternau.)

‘apricot kernels shipped today’; does that refresh your recollection, Mr. Sternau, as to whether or not the 200 pounds of apricot kernels were shipped on that date?

“A. No, it wouldn’t refresh my memory.

“Q. Did you send that telegram personally?

“A. I don’t think so—I could—no, I did not; I don’t believe I was in the office on that date.

“Q. And is it your testimony, then, that the 200 lbs. of apricot kernels were shipped by Bonzi?

“A. I believe so.

“Q. Did you have any conversation with Mr. Bonzi pertaining to the shipment of those 200 lbs. of apricot kernels?

“A. No, I don’t believe I did, personally.

“Q. How do you know that the apricot kernels were shipped by Bonzi?

“A. Because I believe Mr. Hansaw in our office, and Mr. Tarrico, advised me.

“Q. Now, Mr. Sternau, who cracked those 200 lbs. of apricot kernels?

“A. I believe they were cracked by Continental Nut Company at Chico.

“Q. Did Sunset-Sternau Food Company have anything to [5-A-25] do with having those kernels cracked?

“A. None whatsoever—Mr. Bonzi handled it.

“Q. In other words, Sunset-Sternau Food Company expected to receive these cracked apricot kernels from Mr. Bonzi?

“A. Do you mean the 200 lbs.?

(Deposition of Sydney Sternau.)

"Q. Well, this 200 lbs.?"

"A. I couldn't tell you if Mr. Bonzi was having Continental ship them direct from Chico to American Almond Products or not; I don't remember any of the details of it.

"Q. Did Mr. Bonzi have these 200 lbs. cracked and ship them at the request of Sunset-Sternau Food Company? A. Yes.

"Q. Now, Mr. Sternau, I show you a letter dated September 8, 1955, and ask you if that is a photostatic copy of the letter of that date which you received from Prince, Keeler & Co., Inc.?"

"A. Yes, it is.

"Mr. Eisner: I will ask that this be marked next in order.

"(Thereupon the document referred to was marked as Plaintiff's Exhibit No. 10 for identification.)"

Mr. Eisner: We offer it in evidence now as Exhibit No. 10.

The Court: So ordered.

(Letter dated September 8, 1955, Prince, Keeler & Co., Inc., to Sunset-Sternau Food Co. was marked Plaintiff's Exhibit No. 10 in evidence.) [5-A-26]

Mr. Eisner: It is on the letterhead of Prince, Keeler & Co., Inc., dated September 8, 1955, addressed to Sunset-Sternau Food Company, Modesto, California: (Whereupon Mr. Eisner read the letter into the record.)

(Deposition of Sydney Sternau.)

Mr. O'Connor: May we have a recess at this time, your Honor?

The Court: All right.

(Recess.)

The Court: You may proceed.

(Mr. Eisner continued with the reading of the deposition.)

“Mr. Eisner: Now, Mr. Sternau, this letter advises that:

‘Mr. Kaplan of American Almond Products, Co., Inc., phoned today to advise that the 2/100# bags of Apricot Kernels were received and found satisfactory with one exception—the broken Kernels far exceeded the normal tolerance.

‘We advised him that we were mailing your formal contract No. 2023 received today—however, during the discussion he advised that he had overlooked the following standard clause:

‘Merchandise Not To Exceed 5% By Weight of Broken Kernels’

and requested that we add this on our contracts and return yours for the same addition. He advised that all his [5-A-27] regular suppliers, i.e. Cal-Pak, Rosenberg insert this clause which is a recognized condition of sale for this particular item. It was not brought up before, because he assumed it would be included as a matter of course in your contract.

‘We are, therefore, returning your contract No. 2023 as enclosure and will appreciate your author-

(Deposition of Sydney Sternau.)

izing the addition of the above clause in compliance with the buyer's request.

'Awaiting your further advice in this matter.

'Yours very truly,'

Now, Mr. Sternau, after receipt of this letter, did you make any inquiry to ascertain whether a 5% limitation by weight of broken kernels was the custom and usage in dealing with this product?

"A. I think we answered in reply——

"Mr. Eisner: I asked you a question; would you read the question?

"(Record read by the Reporter.)

"The Witness: A. I don't remember.

"Q. (By Mr. Eisner): The three copies of the document which we have identified as Plaintiff's Exhibit No. 9 for identification were returned to you as enclosure with this letter of September 8, 1955?

"Mr. O'Connor: Let me put it this way: I think we [5-A-28] can agree that they must have been; they were returned—whether Mr. Sternau has any personal knowledge is again a question of fact.

"Q. (By Mr. Eisner): And when they were returned on September 8, 1955, what, if anything, did you do with them?

"A. Replied—we wrote a letter back that we couldn't comply with the——

"Mr. Eisner: Well, the letter would speak for itself.

"Q. Did you retain those three copies of Exhibit No. 9? A. Yes.

(Deposition of Sydney Sternau.)

“Q. For identification? A. Yes.

“Q. And you put them in your files of the Sunset-Sternau Food Company?

“A. I don't remember where they were put, or whether they were put in the files or not, but we kept them.

“Q. Now, Mr. Sternau, is it a fact that on about September 19, or 20, 1955, a fire occurred at the place of business at Sewell Brown and Company in Los Gatos? A. I heard it had.

“Q. Don't you know whether it had or not?

“A. I don't know the date—I know it burned up.

“Q. You know there was a fire there?

“A. I know there was a fire there, yes.

“Q. Is it a fact that a substantial portion of the apricot kernel crop of the year 1955 was destroyed in that [5-A-29] fire?

“A. I couldn't tell you—I don't know what part of the crop.

“Q. When you—and I mean the Sunset-Sternau Food Company—had you done business with the Sewell Brown Company in Los Gatos?

“A. I think about five years ago we did business with them.

“Q. Did you expect Sewell Brown & Company of Los Gatos to crack the apricot kernels that you were offering for sale to the American Almond Products Company? A. No, sir.

“Q. I show you this photostatic copy of a letter dated September 21, 1955, and ask you if you rec-

(Deposition of Sydney Sternau.)

ognize that as a letter written by you to Prince, Keeler & Co., Inc. A. Yes.

“Mr. Eisner: I will ask that this be marked for identification.

“(Thereupon the document referred to was marked as Plaintiff’s Exhibit No. 11 for identification.)”

Mr. Eisner: We now offer it as Exhibit No. 11.

The Court: It may be admitted and marked.

(Letter September 21, 1955, Sunset-Sternau to Prince, Keeler & Co., Inc., received in evidence as Plaintiff’s Exhibit No. 11.) [5-A-30]

Mr. Eisner: It is dated September 21, 1955, Prince, Keeler & Co., Inc., 99 Hudson Street, New York, New York. (Whereupon Mr. Eisner read the letter into the record.)

(The reading of the deposition was continued as follows):

“Q. (By Mr. Eisner): In this letter, Mr. Sternau, you said:

‘We just had the packer in who was going to shell the Apricot Kernels——’

Who was the packer that you had in?

“A. Bonzi.

“Q. You referred to him as a ‘packer?’

“A. Yes.

“Q. Has he ever packed anything, that you know of?

“A. He had a shelling plant to shell these apricot kernels—we designated him as a packer because he was going to be the packer.

(Deposition of Sydney Sternau.)

‘And he advised me that he cannot guarantee 5% pieces, that they cannot be any better than the sample.’

You have stated, Mr. Sternau, that this sample was not cracked by Bonzi, but was cracked by the Continental Nut Company? A. Yes, sir.

“Q. ‘He is having a very difficult time in shelling these and would like to get out of this contract this season.’

This contract that you refer to in this letter is the contract with the American Almond Products Company for 75 tons of apricot kernels? A. Yes.

“Mr. O’Connor: I will instruct the witness that he [5-A-31] does not have to answer that question; that calls for his conclusion as to a matter of law.

“Mr. Eisner: I disagree with you, and the witness has already answered the question.

“The Witness: If that’s the way it’s going to be, let’s go to court.

“Mr. O’Connor: You just don’t answer the question—if you get any more questions of that kind, the same instruction will be given to you; the instruction here is that he is not going to answer the question because it calls for his opinion and conclusion.”

Mr. O’Connor: I at this time, if the Court please, move to strike both the question and answer on the ground that it does call for the opinion and conclusion of the witness on a matter upon which the trial court would pass whether or not there is a contract. The Court will take cognizance, I think,

(Deposition of Sydney Sternau.)

of the fact that the witness is a business man and a lay person. Whether there is a contract or is not is for the Court to determine.

Mr. Eisner: There is no question whether it is going to be a question for the determination of the Court ultimately, but the question of this letter, the witness recognizes that there is a contract and that there is a contract in existence and he refers to it as he would like to get out of this contract and he has answered the question which refers to this contract, [5-A-32] "Are you referring to the contract for the 75 tons with American Almond Products Company" and he is identifying what he referred to in the letter as this contract and that is a part of the evidence from which the Court ultimately can deduce by reason of the conduct of the parties, and whether they themselves have recognized the contract, and whether or not there has been a ratification.

It is part of the evidence in the case, if the Court please.

Mr. O'Connor: If the Court please, on the same subject the subject as to whether or not a document or series of documents are a contract is solely the province of the trial court in this case. The loose reference by a lay person is not binding upon the Court and certainly is a conclusion. As a matter of fact, it is a conclusion of law on the part of the witness, or calls for such a conclusion, and the elements of a contract, of course, assume that there is a binding agreement upon two persons; does one

(Deposition of Sydney Sternau.)

person recognize and does the other person not recognize it? Is there in fact a writing or verbal agreement capable of being enforced?

On that ground I would ask that my motion to strike both the question and answer be granted by the Court.

Mr. Eisner: If the Court please, as I stated, the reference and recognition by the defendant—by the president of the defendant, that there is a contract, and that he wanted to get out of the contract, and referring to the contract as [5-A-33] pertinent evidence. There are many cases, if the Court wanted to take the time for it, but I don't think it is necessary, where there is a question arising as to whether or not there is a ratification, whether or not there is a recognition of the contract and where the one party to the contract recognizes the contract and refers to it, that there is a contract, such conduct and such recognition, particularly in writing, is not only pertinent, it is very pertinent and material.

The Court: Let us crystalize our problem the best we can. Get the question and answer here and I will rule.

Mr. O'Connor: Line 16.

The Court: Since counsel objected to it, let us hear you.

Mr. O'Connor: The question commencing on page 24, line 14:

“Q. ‘He is having a very difficult time in shelling these and would like to get out of this contract this season.’

(Deposition of Sydney Sternau.)

"This contract that you refer to in this letter is the contract with the American Almond Products Company for 75 tons of apricot kernels?

"A. Yes."

I would like to instruct him not to answer the question. He had answered it while I was instructing him not to answer it.

Mr. Eisner: Before you instructed him.

Mr. O'Connor: I objected to it on the ground it calls for his opinion and conclusion whether——

The Court: In the interests of time, I will allow it, subject to your motion to strike. [5-A-34]

(Reading of deposition continued.)

"Q. (By Mr. Eisner): You wrote this letter yourself, didn't you? A. I don't know.

"Q. Just look at it.

"A. I don't know—and that's it.

"Q. Do you mind looking at it to see?

"A. All right, I looked at it.

"Mr. O'Connor: We will agree that he wrote it.

"The Witness: I agree that I wrote it.

"Q. (By Mr. Eisner): Where did this conversation take place with Mr. Bonzi—in your office in the office of the Sunset-Sternau Food Company?

"A. I don't remember.

"Q. I call your attention to the fact that you said 'We just had the packer in who was going to shell the apricot kernels'?

"A. I still don't remember.

"Q. Did you have a conversation with Mr. Bonzi? A. I don't remember.

(Deposition of Sydney Sternau.)

“Q. Did Mr. Bonzi tell you that he wanted to get out of the contract? A. I don’t remember.

“Mr. O’Connor: Just a minute, I am going to ask for a recess here; I want to talk to Mr. Sternau; come outside for a second.

“(Short recess.)

“Q. (By Mr. Eisner): Mr. Sternau, about September 22, 1955, [5-A-35] do you remember that Mr. Kaplan was in California, and had some telephone conversations with you personally?

“A. I don’t remember the date; I know you came down to the office——

“Q. I am not talking about that, I am speaking about a couple of days, two or three days after the fire that took place at the Sewell Brown Company. A. No, I don’t remember.

“Q. Let me refresh your recollection: I will ask you if you had a telephone conversation with Mr. Kaplan at that time, in which you told Mr. Kaplan that the delivery of the apricot kernels was delayed because of the lack of cracking facilities.

“A. I don’t remember; personally, I don’t remember.

“Q. You have no recollection of that?

“A. No recollection of that at all.

“Q. Do you remember that Mr. Kaplan told you that if you had difficulty with the cracking facilities, that he would be able to arrange cracking facilities for the Sunset-Sternau Food Company with either Rosenberg Brothers or California Packing Corporation? A. No, the only time——

(Deposition of Sydney Sternau.)

“Q. To do the cracking?

“A. The only time I remember the conversation was when he was down at Modesto with Bonzi and you; I don’t remember anything before. [5-A-36]

“Q. You don’t remember anything before that?

“A. I don’t remember that conversation with Mr. Kaplan.

“Q. Do you remember telling Mr. Kaplan that he would get full delivery and that Sunset-Sternau Food Company would not fall down on its contract?

“A. No, I don’t remember telling Mr. Kaplan that.

“Q. Do you remember that Mr. Kaplan told you that if the California Packing Corporation did the cracking, there would be no difficulty?

“A. No, I don’t remember that; I remember him telling us that——

“Q. You don’t remember any such conversation at all?

“A. No, I don’t remember any such conversation.

“Mr. O’Connor: You are referring to the telephone conversation, counsel?

“Mr. Eisner: Yes.

“Q. And do you remember that there was a second telephone conversation with Mr. Kaplan, or Mr. Kaplan called you and told you that he had arranged with Carroll Glenny of the California Packing Corporation to do the packing for you?

“A. No, I don’t remember.

“Q. You don’t remember anything of the kind?

(Deposition of Sydney Sternau.)

“A. No.

“Q. I show you a letter dated September 28, 1955, and ask you if you recognize that as a letter received from [5-A-37] Prince, Keeler & Co., Inc?

“A. Yes.

“Mr. Eisner: I will ask that this be marked for identification.

“(Thereupon the document referred to was marked as Plaintiff’s Exhibit No. 12 for identification.)”

Mr. Eisner: We offer it in evidence as Plaintiff’s Exhibit No. 12.

The Court: It may be admitted and marked.

(Whereupon Plaintiff’s Exhibit No. 12 for identification was admitted in evidence as Plaintiff’s Exhibit No. 12.)

Mr. Eisner: This letter is on the letterhead of Prince, Keeler & Co., Inc., dated September 28, 1955, addressed to Mr. S. M. Sternau, Sunset-Sternau Food Company, Modesto, California. (Whereupon Mr. Eisner read the letter into the record.)

(Reading of the deposition continued.)

“Q. (By Mr. Eisner): I call your attention, Mr. Sternau, to this letter, which is addressed to you as ‘Dear Sydney’; that is your first name?

“A. Yes.

“Q. ‘Just finished speaking with Mr. Jack Kaplan of American Almond Products, who advised me that you had agreed to the following during your discussions with him on his recent visit to California.

(Deposition of Sydney Sternau.)

'It is understood, due to the fact that you have no shelling facilities for Apricot Kernels, that it has [5-A-38] been arranged through the kindness of Mr. Carroll Glenney of Calpack that Mr. Engel (Calpak's Plant Manager) to shell the Apricot Kernels which we sold American Almond for your account.'

"Q. Does that serve to refresh your recollection that you did have such a conversation by telephone?

"A. No, sir, it does not.

"Q. 'It certainly was fortunate that Mr. Kaplan had connections in Calpack; otherwise, we would have been in a mess with this good buyer—Jack Kaplan was most cooperative in this matter.

'We will appreciate your keeping us informed concerning shipping information in this matter.

'Kindest regards.

Yours very truly,
Prince, Keeler & Co., Inc.
Alex Astrack
Alex Astrack'

Now, Mr. Sternau, after receiving this letter, did you make any reply to it? A. I don't know.

"Q. Did you make any reply in which you stated that there was no such conversation that was had by and between you and Mr. Kaplan?

"A. I don't remember.

"Q. If you replied to that letter, do you have any reply other than what has already been produced here at [5-A-39] the request for production?

"A. No, we have no more letters in our file.

"Q. Now, after receipt of that letter, Mr. Ster-

(Deposition of Sydney Sternau.)

nau, did you contact California Packing Corporation and make any arrangement to have them do the cracking of these kernels?

“A. I don’t remember.

“Q. That is the best answer you can make to that question, is it? A. Yes.

“Q. Would other men in your organization have had contact with——

“A. Maybe Hanshaw, but I don’t remember.

“Q. Now, Mr. Sternau, I am going to show you a letter dated October 12, 1955, photostatic copy of such a letter and ask you if you recognize this as a letter that you wrote? A. Yes.

“Mr. Eisner: I will ask that it be marked Plaintiff’s Exhibit for identification next in order.

“(Thereupon the document referred to was marked as Plaintiff’s Exhibit No. 13 for identification.)”

Mr. Eisner: We now offer the document as Exhibit No. 13, and it reads as follows——

Mr. O’Connor: May I see that, counsel? I don’t seem to have a copy of that.

Mr. Eisner: It is a letter written by Mr. Sternau, October 12th. [5-A-40]

(Letter dated October 12, 1955, Sunset-Sternau to Prince, Keeler & Co., Inc., was received in evidence as Plaintiff’s Exhibit No. 13.)

(Whereupon Mr. Eisner read the letter so marked into the record, and continued with the reading of the deposition as follows:)

(Deposition of Sydney Sternau.)

“Q. (By Mr. Eisener): I call your attention to this language in this letter, Mr. Sternau.

‘The same thing goes for the American Almond Products. They are doing us no favor in getting Calpack to shell the apricot kernels. They are doing themselves a favor because they bought them at a low price and they wanted delivery.’

Do you remember making that statement in the letter?

“A. I must have—the letter is there, written by me.

“Q. Does that refresh your recollection as to whether or not any arrangements were told you by Mr. Kaplan that had been made with the California Packing Corporation?

“A. No, it does not.

“Q. I show you a photostatic copy of a telegram dated October 21, 1955, and ask you if you recognize it as a telegram received by the Sunset-Sternau Food Company. A. Yes.

“Mr. Eisner: I will ask that this be marked exhibit next in order for identification. [5-A-41]

“(The document referred to was marked as Plaintiff’s Exhibit No. 14 for identification.)”

Mr. Eisner: We offer it in evidence, and it reads as follows:

Mr. O’Connor: If the Court please, I will object to the telegram being read, and my objection on the basis it is hearsay and assumption of something not in evidence. It contains a conclusion. A matter of the sender of the telegram, and it is not binding upon this defendant.

(Deposition of Sydney Sternau.)

Mr. Eisner: This is dated October 21, 1955, addressed to Mr. S. M. Sternau, Sunset-Sternau Food Company, Modesto.

"American Almond insists on knowing when you are delivering apricot kernels per our order 9-12079 which was confirmed by you.

Prince Keeler & Co., Inc."

Mr. O'Connor: If the Court please, I will urge the objection which I have made and I will add, Your Honor, that this is a document containing apparently the opinion and conclusion of the person not a party to the action, not binding upon this defendant. It is hearsay so far as this defendant is concerned.

Mr. Eisner: This was a communication from Prince, Keeler & Co. whom Mr. Sternau has identified as his broker and representative in New York, and which the correspondence so far, and the contracts show, handled this transaction. [5-A-42] It is a communication to the witness, that he received. His conduct respecting this and the witness has alleged that the sale was confirmed, and what he did respecting it is certainly pertinent. It is a communication directly to the witness. It is not hearsay.

It is not offered as proof of its contents. It is offered as evidence of conduct and what transpired pertaining to this transaction. It is in no sense hearsay.

Mr. O'Connor: I submit that it is strictly hearsay, if the Court please, as well as containing a con-

(Deposition of Sydney Sternau.)

clusion of the sender which is in no wise binding upon this defendant. He is a third party to the transaction.

The Court: I will rule, subject to your motion to strike and over your objections so you may have the full opportunity.

Mr. O'Connor: Reserve the motion, then, Your Honor.

The Court: Yes.

Mr. O'Connor: Thank you.

(Whereupon the telegram in question was admitted into evidence as Plaintiff's Exhibit 14.)

(Mr. Eisner continued with the reading of the deposition.)

"Q. (By Mr. Eisner): I call your attention to this telegram, which states that 'American Almond insists on knowing when you are delivering apricot kernels per our order 9-12079 which was confirmed by you.'

Did you make any reply to that telegram? [5-A-43]

"Mr. O'Connor: This is from your independent recollection, Mr. Sternau, if you have a recollection.

"A. (By the Witness): No, I have no recollection of it at all.

"Q. (By Mr. Eisner): Now, I show you a letter dated October 25, 1955, from the American Almond Products Company, and ask you if you recognize that as a letter of which you have the original?

"A. Yes.

(Deposition of Sydney Sternau.)

“Mr. Eisner: I will ask that that be marked our exhibit next in order.

“(Thereupon the document referred to was marked as Plaintiff’s Exhibit No. 14 for identification.)”

Mr. Eisner: We now offer it as Exhibit 15, and it reads as follows: It is on the letterhead of American Almond Products Company, Inc., October 25, 1955, Mr. Sydney Sternau, Sunset-Sternau Food Co., Modesto, California:

(Whereupon Mr. Eisner read the letter into the record.)

(The letter just read was received in evidence as Plaintiff’s Exhibit No. 15.)

(Reading of the deposition continued.)

“Q. (By Mr. Eisner): I call your attention to this letter, Mr. Sternau.

‘With reference our contract for apricot kernels of 9/1/55, you recall that on my recent trip to California we had an opportunity to talk about the matter on the phone.’ [5-A-44]

Does that refresh your recollection that you had a conversation? A. No, it does not.

“Q. This further statement is made:

‘At that time you indicated to me as result of Sewell Brown Co. loss of cracking plant by fire, you were attempting to accomplish your crack out of pits with other people, and asked if I could be of some help.’

Is it a fact that after the fire you were attempting to accomplish your cracking with other people?

(Deposition of Sydney Sternau.)

“A. Mr. Bonzi was trying to get other people to crack them, but I don’t know who he was going to have crack them; I couldn’t tell you that; I couldn’t answer that.

“Q. Continuing on with the letter:

‘You were attempting to accomplish your crack out of pits with other people, and asked if I could be of some help?’ A. I do not.

“Q. ‘As you know, I immediately obtained the cooperation of California Packing Corp. Mr. Carroll Glenney stated that he had arranged with Mr. Engel (Calpack’s plant manager) to accomplish the crack out for your account at some future date which would be convenient for both parties—details to be finalized between you subsequently.’

Now, Mr. Sternau, you received this letter of [5-A-54] October 25, 1955? A. Yes.

“Q. Did you make any reply to it?

“A. I don’t believe so.

“Q. I notice that this letter states. ‘Please be kind enough to give us a prompt reply.’

You have no recollection of making any reply?

“A. No.

“Q. I show you this letter of October 26, 1955, and ask you if you recognize it as a letter received by you from Prince, Keeler & Co., Inc.,

“A. Yes.

“Mr. Eisner: We offer this as our exhibit next in order.

“(Thereupon the document referred to was

(Deposition of Sydney Sternau.)

marked as Plaintiff's Exhibit No. 16 for identification.)"

Mr. Eisner: We offer it in evidence as Exhibit No. 16.

The Court: It will be admitted and marked next in order.

(Whereupon Plaintiff's Exhibit No. 16 for identification was received in evidence as Plaintiff's Exhibit No. 16.)

Mr. Eisner: This is on the letterhead of Prince, Keeler & Co., Inc., dated October 26, 1955. (Mr. Eisner read the entire letter into the record.)

(Reading of the deposition continued.)

"Mr. Eisner: Now, I show you this letter dated October 31, 1955. A. Yes, we have it.

"Mr. Eisner: I will ask that that be marked our [5-A-46] exhibit next in order.

"(Thereupon the document referred to was marked as Plaintiff's Exhibit No. 17 for identification.)"

Mr. Eisner: We offer the exhibit No. 17.

The Court: It may be admitted and marked.

(Whereupon Plaintiff's Exhibit Exhibit No. 17 for identification was received in evidence as Plaintiff's Exhibit No. 17.)

Mr. Eisner: October 31, 1955, Prince, Keeler & Co., Inc., 99 Hudson Street, New York, Attention Mr. William Berke:

(Whereupon Mr. Eisner read the letter into the record.)

(Deposition of Sydney Sternau.)

Mr. O'Connor: I notice it is 12:00 o'clock, if the Court please.

The Court: We will take an adjournment until 2:00.

(Whereupon an adjournment was taken in these proceedings until 2:00 o'clock p.m. this date.) [5-A-47]

Thursday, February 21, 1957—2:00 O'Clock P.M.

Mr. Eisner: Your Honor, at the close of the morning session we had just introduced into evidence Exhibit 17, and I shall proceed from that point on page 34, line 4.

"Q. (By Mr. Eisner): This was a letter that you personally wrote to Prince, Keeler & Co., Inc., isn't that true, Mr. Sternau? A. Yes.

"Q. Your letter? A. Yes.

"Q. I call your attention to the first paragraph: 'In reply to your letter of October 26th, wish to advise you, and you can advise American Almond Products that we are trying to get a commitment from the man with whom we are working on the Apricot Kernels. We have not written you because we have nothing to tell you. We have called this man on the telephone every day for the past ten days asking him to come to the office but he has not done so and today we are turning the matter over to Mr. O'Connor to try to get a commitment from this man. We acted in good faith and I know the buyer bought in good faith and that you sold in good faith and we are going to do everything

(Deposition of Sydney Sternau.)

possible to get this matter settled within the next ten days.'

Now, Mr. Sternau, the man from whom you were asking to get a commitment was Mr. Bonzi?

"A. Yes, sir. [5-A-48]

"Q. And the Mr. O'Connor referred to is the attorney for your Company? A. Yes.

"Q. Now, Mr. Sternau, just what were your financial arrangements with Mr. Bonzi in this matter—Mr. Bonzi as I understand it, Sunset-Sternau Food Company had a certain quantity of wet kernels itself? A. Yes.

"Q. How many tons?

"A. I think approximately 150 tons of wet kernels.

"Q. You mean kernels that had not been cracked?

"A. No, that had not been dried; after they dry them, they crack them.

"Q. They have to be dried and cracked?

"A. Yes.

"Q. And what did you do with those 150 tons?

"A. Mr. Bonzi—we delivered them to Mr. Bonzi..

"Q. You delivered, Sunset-Sternau Food Company delivered the 150 tons to Mr. Bonzi?

"A. Yes, sir.

"Q. Was Mr. Bonzi to supply another quantity of tons of apricots to be marketed? A. Yes.

"Q. How many tons of apricot kernels did Mr.

(Deposition of Sydney Sternau.)

Bonzi supply to, or agree to supply, to the Sunset-Sternau Food Company to be sold?

"A. 75 tons of kernels, including ours.

"Q. Do I understand, then, that the 75 tons that were offered to American Almond Company were all the kernels [5-A-49] that you—and when I say 'you,' I mean Sunset-Sternau Food Company—and Mr. Bonzi were going to offer for sale?

"A. That was all Mr. Bonzi offered at that time for sale.

"Q. Did he tell you that he expected to have more than Sunset-Sternau could sell?

"A. He did.

"Q. How many more tons did he expect to have for sale by the Sunset-Sternau Food Company?

"A. I couldn't tell you—I don't know the amount of apricot pits that he handles.

"Q. Was this a joint venture between Sunset-Sternau Food Company and Bonzi?"

Mr. O'Connor: If the Court please, I will object to that question as calling for the opinion and conclusion of the witness as to whether it is a joint venture between Sunset and Bonzi.

Mr. Eisner: I will withdraw that question.

The Court: It may go out.

Mr. Eisner: (Continuing with reading of deposition.)

"Q. (By Mr. Eisner): What were your arrangements with Mr. Bonzi?

"A. We were going to get a brokerage for selling them.

(Deposition of Sydney Sternau.)

“Q. Plus the price for the wet pits that were delivered to Bonzi by Sunset? A. Yes.

“Q. What brokerage were you to receive?

“A. I don’t remember; I would like to tell you, but I don’t remember.

“Q. I show you this letter dated October 31 and ask you if you recognize that as a letter written by your attorney on your behalf? A. Yes.”

Mr. O’Connor: If the Court please, I will object to the question first on the basis that asking for the letter of the attorney calls for hearsay as between these parties, and any reference to any such letter is incompetent, irrelevant and immaterial as far as the issues in this case are concerned as between the parties and the issues raised by the pleadings in this case, as to whether or not there was a written contract between the plaintiff and the defendant, and that communications of the attorney as to Bonzi would be a matter involving a confidential relationship between attorney and client, not related in any way to the question of whether it was a sale, whether there was a contract between these parties.

The Court: For the purpose of the record, indicate the purpose of the offer.

Mr. Eisner: The purpose of the offer is to show that it is a direct admission by the authorized agent of the defendant to a person who is not only the attorney and authorized, according to the testimony of the witness and the deposition, to write the letter, instructed to write the letter on his behalf, but,

(Deposition of Sydney Sternau.)

according to the record, particularly Exhibit 17, [5-A-51] he is not only the attorney but the Chairman of the Board of Directors and represents the minority stockholders of the corporation, and, if the Court please,—counsel interrupted—there is just one further question. After I asked Mr. Sternau the question, “I show you this letter dated October 31st and ask you if you recognize that as a letter written by your attorney on your behalf?”

A. “Yes,” Mr. O’Connor interrupted and said, “I wrote that for Sunset, yes.”

The law is, if the Court please, that letters written by a party or his authorized agent may constitute written admissions, and to render them admissible in evidence it is not necessary that they be sent to the party or that the letters to which they are replies shall be produced or accounted for. Attorneys or any other agents may make admissions against their client’s interest, which are admissible in evidence, when they are acting within the scope of their employment and authorization.

If the Court please, the witness himself has testified that he directed Mr. O’Connor as his attorney to write this letter on his behalf to Bonzi. Your Honor has not heard the letter. Counsel is apprehensive that it be introduced in evidence. I submit that he is not only the attorney authorized to write the letter for Sunset, but he is also the Chairman of the Board of Directors of the corporation, and as an authorized agent he certainly is authorized to make admissions [5-A-52] on behalf of his

(Deposition of Sydney Sternau.)

clients, and those admissions are admissible in evidence.

Mr. O'Connor: If the Court please, on the other hand we have a situation where the attorney acting for a party to the action in an attempt to resolve differences, may make an offer of compromise, and this is similar to that situation. In other words, if a situation can be resolved by writing to a third party involved in a transaction, and for the purpose of attempting to get him to conform to verbal commitments, in order to avoid litigation, it certainly comes within the purview of the statutes relating to compromise, relating to confidential communications between attorney and client. In this case the letter is written in that capacity and in that capacity alone, regardless of the position that the company has taken, and so forth. It certainly serves no useful purpose here. These people alleged that they have a written contract. The pleadings so specify. This has a bearing only upon a third party to the transaction.

The Court: Is the matter submitted?

Mr. Eisner: Yes.

The Court: The objection will be overruled.

(Reading of deposition continued.)

"Mr. Eisner: I will ask that this be marked as our exhibit next in order.

("Thereupon the document referred to was marked as [5-A-53] Plaintiff's Exhibit 18 for identification.)"

Mr. Eisner: We offer that as Exhibit No. 18.

(Deposition of Sydney Sternau.)

Mr. O'Connor: If the Court please, my objection will go to the introduction of the document without repetition.

The Court: The objection may be overruled. Let it be admitted and marked.

(The document referred to was thereupon received in evidence, marked Plaintiff's Exhibit 18, and read by Mr. Eisner.)

(Reading of deposition continued.)

"Q. (By Mr. Eisner): I show you this telegram and ask you if you recognize that as a telegram received from Prince, Keeler & Co., Inc.?"

"A. Yes.

Mr. Eisner: I will ask that that be marked as our exhibit next in order.

"(Thereupon the document referred to was marked as Plaintiff's Exhibit No. 19 for identification.)"

Mr. Eisner: We now offer that in evidence.

Mr. O'Connor: The defendant will object to the introduction of this document, if the Court please, on the ground it is hearsay. It contains matters which are incompetent, irrelevant and immaterial, and not bearing upon the issues of this case.

Mr. Eisner: We are not offering it for any purpose of proving anything that is in the telegram, but simply for what the telegram says, a notification, which it is, from Prince, [5-A-54] Keeler, the broker, the agent of the defendant, to the defendant, stating the facts. We will furthermore connect it up.

(Deposition of Sydney Sternau.)

The Court: The objection will be overruled.

(The document referred to was thereupon received in evidence and marked Plaintiff's Exhibit 19, and read by Mr. Eisner.)

(Reading of deposition continued.)

"Q. (By Mr. Eisner): I show you a letter dated November 3, 1955, and ask you if you recognize it as a letter received by you from Prince, Keeler & Co., Inc.? A. Yes.

"Mr. Eisner: May that be marked our exhibit next in order?

"(Thereupon the document referred to was marked as Plaintiff's Exhibit No. 20 for identification.)"

Mr. Eisner: And we offer it in evidence as such.

Mr. O'Connor: The same objection that I have made to Plaintiff's Exhibit No. 19, your Honor.

The Court: The same ruling.

(The document referred to was thereupon received in evidence, marked Plaintiff's Exhibit 20, and read by Mr. Eisner.)

"Q. (By Mr. Eisner): This letter from Prince, Keeler & Co., Inc., which has been marked No. 20 states:

'We have your letter of October 31st regarding American Almond Products' Apricot Kernels.'

Your letter of October 31st referred to is now Exhibit [5-A-55] No. 17 for identification?

"A. Yes.

"Mr. O'Connor: We will agree that that is correct.

(Deposition of Sydney Sternau.)

“Q. (By Mr. Eisner): Now I show you this letter dated November 3, 1955, from Prince, Keeler & Co., Inc.; you received that letter?

“A. Yes.

“Q. I will ask you if with this letter just identified there was enclosed the letter which I am now showing you from the American Almond Products Company to Prince, Keeler & Co., Inc.?

“A. Yes.

“Mr. Eisner: I will ask that those two letters be received as exhibits next in order, respectively.

“(Thereupon the documents referred to were marked as Plaintiff’s Exhibits Nos. 21 and 22, respectively.)”

Mr. Eisner: We offer them now in evidence.

The Court: Let them be admitted and marked.

Mr. O’Connor: Same objection, if the Court please.

The Court: The same ruling.

(The documents referred to were thereupon received in evidence, marked respectively Plaintiff’s Exhibits 21 and 22, and read by Mr. Eisner.)

“Q. (By Mr. Eisner): I show you this letter dated November 2, 1955, and ask you if it is a letter written by Mr. O’Connor on behalf of Sunset-Sternau Food Company. A. Yes.

“Mr. Eisner: May this be marked our exhibit next in order? [5-A-56]

(Deposition of Sydney Sternau.)

“(Thereupon the document referred to was marked as Plaintiff’s Exhibit No. 23 for identification.)”

Mr. Eisner: We offer it as Exhibit 23. It is a letter that you wrote under date of November 3, 1955.

Mr. O’Connor: The same objection, if the Court please, as to my letter of November 3rd as I made previously to the exhibit which is designated Plaintiff’s Exhibit 18 for purposes of the record.

The Court: The objection is overruled. It may be received.

(The document referred to was thereupon received in evidence, marked Plaintiff’s Exhibit No. 23, and read by Mr. Eisner.)

“Q. (By Mr. Eisner): I show you a letter dated November 4, 1955, and ask you if it is a letter written by you, Mr. Sternau, to Prince, Keeler & Co., Inc.?” A. Yes.

“Q. I show you a letter dated November 4, 1955, and ask you if it is a letter written by Sunset-Sternau Food Company to Bonzi?”

“A. Yes, sir.

“Q. And the apricot kernels referred to as picked up at your plant were the 150 tons that you referred to?” A. Yes.

“Mr. Eisner: I will ask that that be marked our exhibit next in order.

“(Thereupon the documents referred to were marked as Plaintiff’s Exhibits Nos. 24 and 25, respectively, for identification.)” [5-A-57]

(Deposition of Sydney Sternau.)

Mr. Eisner: We offer them in evidence as Plaintiff's Exhibits 24 and 25.

(The documents referred to were thereupon received in evidence, marked respectively Plaintiff's Exhibits 24 and 25, and read by Mr. Eisner.)

Mr. O'Connor: I see no reason to clutter up the record with that last letter. It obviously has no bearing on this case. It refers to the return of apricot kernels that the Sunset-Sternau Food Company had turned over to Bonzi. It has nothing to do with the issues before the Court in this matter and I will submit that it is hearsay, it is incompetent, irrelevant and immaterial.

Mr. Eisner: It is one link in a chain of recognition, and it shows what was transpiring and did transpire and where the kernels went, and that they were uncracked, and that part of them were in Bonzi's possession, and in conformity with the statement made by Mr. Sternau in his correspondence and in his testimony, he was asking for the kernels back, in attempting to get delivery to American Almond Products Co.

Mr. O'Connor: I fail to see it is part of the issues here as to whether there was a contract between these two people.

The Court: For the limited purpose indicated I will allow it. The objection is overruled.

"Q. (By Mr. Eisner): I show you this letter dated November 7, 1955, and ask you if you received that as a letter [5-A-58] written by Prince,

(Deposition of Sydney Sternau.)

Keeler & Co., Inc. to Sunset-Sternau Food Company? A. Yes.

“Mr. Eisner: I will ask that this be marked as our exhibit next in order.

“(Thereupon the document referred to was marked as Plaintiff’s Exhibit No. 26 for identification.)”

Mr. Eisner: I offer it in evidence as such.

(The document referred to was thereupon received in evidence, marked Plaintiff’s Exhibit 26, and read by Mr. Eisner.)

“Q. (By Mr. Eisner): I show you a letter dated November 9, 1955, and ask you the same question. A. Yes.

“Mr. Eisner: May that be marked as No. 27?

“(Thereupon the document referred to was marked as Plaintiff’s Exhibit No. 27 for identification.)”

Mr. Eisner: I offer that document in evidence.

(The document referred to was thereupon received in evidence, marked Plaintiff’s Exhibit 27, and read by Mr. Eisner.)

“Q. (By Mr. Eisner): I notice in this letter dated November 4, 1955, which is Exhibit No. 24, a letter written by you personally, you state: ‘——if there had not been a fire out there which destroyed a great deal of apricot pits, there would not have been a great demand for this merchandise——’

Is it a fact, Mr. Sternau, that after this fire there was a big demand for the apricot kernels? [5-A-59]

“A. Yes, I believe so.

(Deposition of Sydney Sternau.)

“Q. (By Mr. Eisner): I show you this letter which purports to be one from Mr. O'Connor dated November 11, 1955, and ask you if it is a letter that was written on behalf of Sunset-Sternau Food Company? A. Yes.

“Mr. Eisner: May this be marked our exhibit next in order?

“(Thereupon the document referred to was marked as Plaintiff's Exhibit No. 28 for identification.)”

Mr. Eisner: I offer that document in evidence.

(The document referred to was thereupon received in evidence.)

Mr. O'Connor: The same objection, if the Court please. There again the contents of the letters speak for themselves. There is an attempt to settle the dispute without relation as to the legal question involved and whether there is a contract or not and to avoid any possible litigation. That is the purpose of the letter. It is obvious from a reading of it, and under those circumstances, it being along the nature of an attempted compromise by obtaining a third party's consent of delivery of certain merchandise, I think it inadmissible in this proceeding. It certainly does not add to or detract from either the plaintiff's case or the defendant's case in this matter before the Court, and as such my objection goes to it that it would be incompetent, irrelevant and immaterial in this controversy and not within the issues raised by the pleadings. [5-A-60]

Mr. Eisner: This is another letter, if the Court

(Deposition of Sydney Sternau.)

please, directly containing admissions by the authorized agent.

Mr. O'Connor: This is a letter not written to Bonzi but to Prince, Keeler & Company.

The Court: The objection is overruled.

(Plaintiff's Exhibit 28 was thereupon read by Mr. Eisner, after which he continued with the reading of the deposition.)

"Q. (By Mr. Eisner): Now, Mr. Sternau, on or about November 12 or 13, 1955, did Mr. Kaplan and myself call at your place of business, at the place of business of Sunset-Sternau Food Company in Modesto? A. Yes.

"Q. And were conversations held at that time pertaining to getting delivery of the apricot kernels? A. Yes, sir.

"Mr. O'Connor: What was the date, counsel?

"Mr. Eisner: November 12 or 13—it might have been the 14th—approximately that date——

"A. I don't remember exactly, but I know you were there.

"Q. (By Mr. Eisner): Did you state at that time that you would or would not make delivery of the apricot kernels?

"A. I don't believe we made any statement of that type.

"Q. Did you state that you would only make delivery if you could get the apricot kernels from Mr. Bonzi?

"A. I don't remember at all.

(Deposition of Sydney Sternau.)

“Q. Was a meeting held with Mr. Bonzi and his attorneys? [5-A-61] A. Yes, sir.

“Q. And, Mr. Sternau, in response to written interrogatories, your Interrogatory No. 56, that asked for a conversation that took place in the month of September; if you will look at Interrogatory No. 54:

‘Did Mr. Sternau have any personal conversations with Mr. Jack Kaplan in Modesto in the month of September, 1955?’, and then asked what those conversations were, in No. 56, and in answer to 56:

‘Kaplan advised that if Bonzi unable to shell that California Packing Corporation would do the shelling—Bonzi stated he would think it over—Kaplan stated market price per pound was 45 cents—Bonzi said it was approximately 30 cents per pound; on the same date later, in the office of defendant, Bonzi, Kaplan, Tarrico and Sternau present; Kaplan offered to pay more money for shelled kernels that he originally offered; defendant offered to throw 60 wet tons into the deal and waived brokerage fees—if Bonzi would make delivery—Bonzi left stating he would think it over.’

Now, I will ask you if the conversation to which you were testifying and at which the parties present to whom you referred did not take place, not in September, 1953, but in the month of November, 1955? [5-A-62]

“A. That is correct; that conversation took place in Bonzi’s attorney’s office, and again in our office

(Deposition of Sydney Sternau.)

in the afternoon; you were present in Bonzi's attorney's office.

"Q. In the month of November, 1955?

"A. Yes; I made an error on the wet tons; it is 60 tons instead of 150 tons which we owned; that was my error.

"Q. In other words, you had 60 wet tons?

"A. Yes, that was my error entirely.

"Q. In this conversation, again, did Mr. Kaplan state that the California Packing Corporation was ready to do the cracking?

"A. He told that to Mr. Bonzi in your presence.

"Q. Did he also say that as far as 5% tolerance was concerned, that the American Almond Products Company was willing to waive that condition?

"A. No, he did not say it.

"Q. You don't remember that?

"A. I don't remember—he didn't say it.

"Q. You say he offered more money?

"A. He offered more money to Mr. Bonzi; he and Mr. Bonzi in our office talked it over.

"Q. I show you this telegram and ask you if you recognize it as a telegram sent by you to Prince, Keeler & Co., Inc. A. Yes.

"Q. And I call your attention to this language: 'Had very nice talk with Kaplan who is conferring [5-A-63] with O'Connor today'—

Does that refer to a conversation that you had at that time with Mr. Kaplan in Modesto?

"A. Yes.

(Deposition of Sydney Sternau.)

“Mr. O’Connor: By the way, we never did have that conference, Mr. Eisner, with Mr. Kaplan.

“Q. (By Mr. Eisner): I show you a letter dated November 17, 1955——

May that telegram be marked——

“(Thereupon the document referred to was marked as Plaintiff’s Exhibit No. 29 for identification.)”

Mr. Eisner: I offer that in evidence.

The Court: It will be received.

(The telegram referred to was thereupon received in evidence, marked Plaintiff’s Exhibit No. 29, and read by Mr. Eisner.)

(Reading of the deposition was continued.)

“Q. (By Mr. Eisner): I show you a letter dated November 17, 1955, and ask you if you recognize it as a letter received from Prince, Keeler & Co., Inc.? A. Yes.

“Mr. Eisner: May that be marked exhibit next in order?

“(Thereupon the document referred to was marked as Plaintiff’s Exhibit No. 30 for identification.)”

Mr. Eisner: May that be marked our exhibit next in order?

(Letter of November 17, 1955, from Mr. Berke to Mr. Sternau, was thereupon received in evidence, marked Plaintiff’s Exhibit No. 30, and read by Mr. Eisner.) [5-A-64]

(Deposition of Sydney Sternau.)

“Q. (By Mr. Eisner): After these conversations in Modesto with Mr. Kaplan and with myself present, and with Mr. Bonzi and his counsel, did you receive this letter from the attorneys for Mr. Bonzi, dated November 16? A. Yes, sir.

“Mr. Eisner: I will ask that that be marked as No. 31.

“(Thereupon the document referred to was marked as Plaintiff’s Exhibit No. 31 for identification.)”

Mr. O’Connor: If the Court please, my objection to this letter of November 16th from the attorneys for this man Bonzi to Sunset-Sternau is this. I will submit it is entirely beyond the issues raised by the pleadings, raised by the evidence submitted here thus far. It is incompetent, irrelevant and immaterial, and as far as we are concerned, it is hearsay and a self-serving declaration of the attorneys themselves.

Mr. Eisner: The witness has testified that there were these conferences with Mr. Bonzi’s attorneys and with Mr. Bonzi about getting delivery. The pertinency of this letter, if the Court please, is this, that it was not until November 16, 1955, that Mr. Bonzi through his attorneys notified Sunset-Sternau Food Company that he would not make delivery of the almond pits by reason of matters alleged in the letter. I mean, his relations with Sunset-Sternau. And it was not, as the testimony shows, until that letter was received at that time that

(Deposition of Sydney Sternau.)

Sunset-Sternau for the first time and finally refused to make delivery, and [5-A-65] this letter is one of the items, one of the links in the chain as indicative of the date that the seller made his refusal to make delivery and actually fixes the time at which damages are to be fixed if we are entitled to damages, and that is the pertinency. It is not offered for the purpose of proof of any of the controversy or hearsay between Mr. Bonzi and Sunset-Sternau, but simply for the limited purpose of fixing the situation and the time at which Sunset-Sternau was notified by his associate Bonzi that delivery would not be made, and as the record will show, at that time the information was first offered and notification given that delivery would not be made and that negotiations to get delivery were at an end.

Mr. O'Connor: The limited purpose is fine, your Honor, except counsel knows and I know a telephone conversation between the two of us occurred. I think he called me, if I am not mistaken. I told him after reviewing the file that I came to the conclusion that there was not any contract. Sunset-Sternau had tried to accommodate Prince, Keeler in New York, but as long as they were insisting on going ahead with whatever they wanted to do, there would be no delivery, and the actual notification to American that there would be no delivery under any alleged contract came directly from me to Mr. Eisner by telephone conversation, and this letter has nothing to do with that. This is a letter

(Deposition of Sydney Sternau.)

concerning any disagreements between Bonzi and Sunset-Sternau and does not contribute to this [5-A-66] controversy at all. What it does contain—and I see the obvious purpose of the attempt to put it into the record here—it is a self-serving statement by the attorneys for Bonzi that Sunset-Sternau did not live up to their obligations. The attempt is to get the record before this Court; whereas, as a matter of fact, and I think counsel will concede this, if there was any chance of making a contract in this case, it went out the window with the fire that destroyed most of the apricot kernels that were available for market on September 20, 1955, and the price of the apricot kernels throughout the United States as a result of that fire increased by almost 100%, and that was the reason, frankly, why Bonzi would not agree, and that is frankly the reason why the plaintiff in this case wanted delivery on that date. But this serves no useful purpose. This is a self-serving declaration from an attorney who represents a stranger to this action. It contributes nothing and as such I submit it is incompetent, irrelevant and immaterial, and beyond the issues and hearsay.

The Court: The Court is prepared to rule.

Mr. Eisner: Submitted, your Honor.

The Court: I will allow it in subject to a motion to strike and over the objection of counsel.

Mr. Eisner: The letter reads as follows:

(Plaintiff's Exhibit 31 was thereupon read

(Deposition of Sydney Sternau.)

by Mr. Eisner, after which reading of the deposition continued.) [5-A-67]

“Mr. Eisner: Q. And after receipt of that letter from Mr. Bonzi, did you advise American Almond Products Company that no delivery would be made by Sunset-Sternau Food Company; can you answer that question?

“A. I don’t remember.

“Mr. Eisner: Perhaps it will be stipulated by Mr. O’Connor that such a statement was made by him.

“(Discussion off the record.)

“Mr. Eisner: Such notification was delivered through Mr. O’Connor.

“Mr. O’Connor: That is correct, I think it was delivered by myself.

“Mr. Eisner: Q. I show you this letter dated November 16, 1955, and ask you if you recognize that as a letter written by you to the attorney for Mr. Bonzi? “A. Yes.

“Mr. Eisner: May that be marked.

“(Thereupon the document referred to was marked as Plaintiff’s Exhibit No. 32 for identification.)”

Mr. Eisner: We offer that document in evidence as Exhibit 32.

The Court: It will be admitted.

(Letter of November 17, 1955, from Mr. Sternau to Mr. Dean Price, was thereupon re-

(Deposition of Sydney Sternau.)

ceived in evidence, marked Plaintiff's Exhibit 32, and read by Mr. Eisner.) [5-A-68]

(The reading of the deposition continued.)

"Mr. Eisner: Q. Now, Mr. Sternau, what did Mr. Bonzi do with his 75 tons of apricot kernels?

"A. I would like to know the same question; I don't know.

"Q. Did you get back your 60 tons from Mr. Bonzi?

"A. No, and we never got paid for them.

"Q. Were these the only apricot kernels that Sunset-Sternau Food Company ever offered for sale? "A. Oh, yes.

"Q. They were the only ones? "A. Yes.

"Q. This is the only transaction which Sunset-Sternau Food Company has ever had with apricot kernels? "A. Yes, sir.

"Q. Is that true?

"A. Yes, sir, that is true."

Mr. Eisner: That is all.

The Court: We will take a recess. [5-A-69]

Mr. Eisner: Call Mr. George Wright.

GEORGE WRIGHT

called as a witness on behalf of the Plaintiff, being first duly sworn, testified as follows:

Q. (By the Court): State your name, please.

A. My name is George Wright, W-r-i-g-h-t.

Q. Where do you live?

A. San Francisco; 1865 California Street.

Q. Your business or occupation?

A. I am a food broker.

Q. How long have you been so engaged?

A. For the last nine years for myself; previous to that I was in the same type of work, but I worked for S and W.

The Court: Take the witness.

Direct Examination

Q. (By Mr. Eisner): Mr. Wright, in the month of October, 1955, did you, at the *rest* of Mr. Jack Kaplan of the American Almond Products Company, telephone to Mr. Sidney Sternau?

A. Yes, I did.

Q. Can you tell us the exact date that you did so?

A. Yes, I can, because I wrote to Mr. Kaplan to give him the result of that telephone conversation. It was on October 28th.

Q. 1955? A. 1955.

Q. Where did you telephone from? [6]

A. I telephoned from my office at 12 Market Street to Mr. Sidney Sternau in Modesto.

Q. Now, will you tell us as nearly as you can recall, what was said in that conversation?

(Testimony of George Wright.)

A. Well, at first Sidney, Mr. Sternau, seemed rather disturbed that I would bother to call him. Wanted to know what I had to do with this business, since the deal was made in New York. I told him I didn't care where the deal was made, but that since Mr. Kaplan couldn't get any information in New York as to when he could expect shipment of his merchandise, as he had a scheduled shipment of other merchandise from other people, that he had requested me to phone and try to find out for him, and that's exactly what I was doing.

I further reminded Mr. Sternau that when Mr. Kaplan had been here a short while before, that he had made arrangements with Calpak, California Packing Company, who have a kernel-cracking plant, to help Mr. Sternau out by cracking for him the kernels that he had in the form of pits, and since the plant that he had originally intended to use had burnt down, there was some problem as to where he was going to get them cracked.

Q. Just proceed.

A. Mr. Sternau replied that before he could do anything about into Calpak, that he had to get in touch with another partner that he had on this venture, upon whose land the kernels [7] were then being dried.

I replied to him that as far as Mr. Kaplan was concerned, his deal was with Sidney Sternau, he was looking to Sidney Sternau for delivery of the merchandise. Mr. Sternau then asked me if I knew what California Packing Corporation had charged

(Testimony of George Wright.)

Homer Hamlin, who was Mayfair Packing Company. They had the same problem. They likewise were going to have their pits cracked by Gethridge, and when the fire burnt the plant down, Mr. Kaplan made arrangements for them to have them cracked at Calpak.

I told them I didn't know what Calpak had charged Homer Hamlin, nor did Mr. Kaplan and I care about it; that was no business of ours. That was strictly between him and Calpak. All that Mr. Kaplan was concerned about was getting the finished kernels.

That's about the gist of the conversation.

Mr. Eisner: That's all.

Cross Examination

Q. (By Mr. O'Connor): Who is Carl Gertridge?

A. That is Carl Gethridge.

Q. Will you spell that name?

A. G-e-t-h-r-i-d-g-e. He is the manager for Sewell Brown.

Q. The manager of the Sewell Brown plant?

A. The one that burned down.

Q. When did that plant burn down, do you know, sir? [8]

A. Some time in September, I think.

Q. Do you know the exact date?

A. No, I do not. I—no, I honestly don't know exactly when, but I believe it was some time in September.

Q. Did Mr. Kaplan tell you that they had been

(Testimony of George Wright.)

going to buy from Sewell Brown prior to the fire?

A. Mr. Kaplan told me he had bought some from Sewell Brown. We went out to see Sewell Brown; I took him out there to see what was left of it.

The thing was still smoldering when we went out there.

Q. Part of that order which he had made to Sewell Brown——

Mr. Eisner: Just a moment. We object to this as not proper cross examination. Any transaction Mr. Kaplan may have had with Sewell Brown certainly is not pertinent and is not part of anything that this witness has testified to.

He has testified to a conversation that took place between himself and Mr. Sternau. If there is anything else pertaining to that, it would be proper cross examination, but I think the cross examination would be limited to that.

Mr. O'Connor: If the Court please, this is by way of preliminary and by way of foundation in cross examining the witness.

The Court: I will allow it.

Mr. O'Connor: For the purpose of showing bias and prejudice on the part of this witness. [9]

Q. Did you talk to Mr. Kaplan when he was here in September? A. Surely.

Q. And then the first time you talked to Mr. Sternau was on October 28th?

A. I believe so.

Q. Do you do business with Mr. Kaplan?

(Testimony of George Wright.)

A. No, I do not.

Q. Do you do business with Mr. Kaplan's brother-in-law who lives in Chicago?

A. Yes, I do.

Q. And they are engaged in the same business as Mr. Kaplan, are they not?

A. That is right.

Q. That is, they make——

A. Paste products.

Q. Paste products out of these apricot kernels?

A. That is correct.

Q. And the Chicago firm is owned by a relative of Jack Kaplan, the plaintiff herein?

A. That is also correct.

Q. And you say that Mr. Sternau stated to you in that October 28th conversation that Sewell Brown, Carl Gethridge, was going to do his packing?

A. No, he did not.

Q. How did Carl Gethridge's name come up?

A. Carl Gethridge's name did not come up in the conversation between Sid Sternau and myself during the phone conversation, but Mr. Kaplan was in my office when he came here right after the fire.

Q. (By Mr. Eisner): You said that that was not said in the conversation?

A. No.

Mr. Eisner: Then it may go out by stipulation. I thought it was said in the conversation.

The Witness: No, the only reference to that was in reference to the fact that Mr. Kaplan had offered his services in securing for Mr. Sternau the

(Testimony of George Wright.)

plant facilities of California Packing Corporation in order to crack the kernels.

Q. (By Mr. O'Connor): When did Mr. Kaplan telephone you and tell you to call Sid Sternau?

A. He didn't telephone me; he wrote me a letter dated October 24th.

Q. In which he asked you to call Sid Sternau?

A. And see if I could find out when he was going to get delivery of his apricot kernels.

Q. At that time did he likewise, Mr. Wright, tell you that he had made arrangements with Calpak?

A. He made arrangements with Calpak from my office when he was here before. I was sitting right there when he called both Sid Sternau and when he called Calpak. I heard the whole [11] conversation. I thought he was very nice to do it.

Q. Did you listen to Mr. Sternau's part of the conversation?

A. No, I did not. I could hear his side of it; I could hear his side of it.

Q. You could hear Mr. Kaplan's side?

A. I could hear Mr. Kaplan's side of it, yes.

Q. Just exactly how did Carl Gethridge come into the picture? You testified on direct examination that it was Carl Gethridge of Sewell Brown. I understood your testimony to be that that reference came up in your conversation with Sid Sternau on October 28th.

A. That was a past reference when I asked Mr. Sternau if he had made any arrangements to ship

(Testimony of George Wright.)

his pits so that they could be cracked to California Packing Corporation. I asked him if he had done that or if he had done anything at all about getting in touch with California Packing Corporation, because they have their own to crack and they have to schedule these things, and certainly in order to get them cracked you got to make some arrangements.

The preliminary arrangements had been made by Mr. Kaplan, but after that it was up to Mr. Sternau to follow through.

Mr. O'Connor: I move that that be stricken, if the Court please, as not responsive to the question and as a self-serving declaration.

The Court: It may go out. [12]

Q. (By Mr. O'Connor): Who introduced the name of Carl Gethridge into this conversation?

A. I did.

Q. You did? A. Yes.

Q. What did you say to Mr. Sternau regarding Mr. Gethridge?

A. I didn't say anything to him regarding Carl Gethridge. I mentioned here the reason that Calpak came into the deal was because Carl Gethridge's plant, that of Sewell Brown, had burned down, and that is why I called to ask him if he had shipped his kernels or had made any arrangements to ship the pits to be cracked into kernels by Calpak.

Q. Who introduced Homer Hamilton's name into the conversation? A. Sydney Sternau.

(Testimony of George Wright.)

Q. Who was Homer Hamilton?

A. Homer Hamilton is connected with Mayfair Packing. They likewise had kernels that had to be cracked.

Q. In the same conversation did you try to sell Mr. Sternau some pecans or other nuts?

A. I have tried to sell Mr. Sternau some pecans, but I don't believe I tried to sell them to him in the same conversation. It is possible. We represented a pecan house account from Carlo, Georgia. Mr. Sternau does buy pecans and I have talked to him several times; in fact, I met him on the street here and he told me to call him—"Any time you have anything to offer, George, call me up."

Q. You have never done any business with him?

A. No, I never have; I have never actually sold to him.

Q. You have never sold Sunset-Sternau?

A. Not to my knowledge.

Mr. O'Connor: No further questions.

Mr. Eisner: No questions.

JACK M. KAPLAN

called as a witness on behalf of the Plaintiff;
sworn.

The Court: Your full name, please?

A. Jack M. Kaplan.

Q. Where do you live?

A. In New York City.

Q. And your business or occupation?

A. I am with American Almond Products, Incorporated—an officer of that corporation.

Q. And how long have you been so engaged?

A. Approximately ten years.

The Court: Take the witness.

Direct Examination

Q. (By Mr. Eisner): What office do you occupy in that corporation?

A. Secretary of the corporation.

Q. Now, Mr. Kaplan, what experience have you had in buying and selling apricot kernels? [14]

A. Well, I have been buying apricot kernels in my capacity as an officer of this corporation for approximately ten years. We don't normally sell apricot kernels; we sell the finished goods, which are made of apricot kernels.

Q. Let me ask you: Just what are apricot kernels?

The Court: If you hadn't asked that, I would have asked it.

The Witness: I have samples of them here.

Mr. Eisner: Very well.

The Witness: But apricot kernels actually are

(Testimony of Jack M. Kaplan.)

a by-product; they are actually the kernels, the seed, of the apricot fruit. They come from—well, the process is probably not too important, but the pit of the fruit is first dried, then cracked, the shell is separated from the nut meat, and the result is the apricot kernel, which I have samples of here. And there are various types. I have three types here.

The Court: I have never seen one myself.

Mr. O'Connor: Have you, counsel?

Mr. Eisner: Not until this case. I saw the samples here.

Q. Now, Mr. Kaplan, you say there are different types of apricot kernels. What are these types?

A. Well, to begin with, there are various types of apricots; the fruits vary, and different varieties of cots will give a different variety of kernel. In each of these varieties, no matter what particular variety of kernel we are talking about, it contains cyanide. [15]

Q. They have to be processed?

A. A small amount of cyanide.

The Court: What do they use them for?

A. As a substitute for an almond in the confectionery and baking industry—an economical substitute.

The Court: Do they grind them?

A. That is correct. We extract the cyanide prior to shipment. Very similar to an almond in content.

The Court: I have been asked that a number

(Testimony of Jack M. Kaplan.)

of times in relation to these various nuts. I never could get any idea of the thing at all.

Q. (By Mr. Eisner): Now, Mr. Kaplan, while we are on that, you say you process these apricot kernels? A. We crack them.

Q. What do you do with them?

A. You mean in the process or after we have—well, I will answer the question this way: We receive these kernels; we remove the skin. After removal of the skin, we pulverize the nut. In the process of pulverizing we remove the cyanide, which is toxic material, then when it is practically free from cyanide and pulverized, we make a nut paste; that is to say, we take the pulverized meat and combine it with sugar, which acts as a kind of a preservative, as well as flavoring agent, and it is called paste,—in this case, from this product called a kernel paste. This is our finished goods. We sell that [16] kernel paste. It in turn is sold to bakers or confectioners. They consider it a raw material for further use in their finished goods process, and a filler for making macaroon cookies.

Q. In other words, the macaroon cookies that are sold are made generally from a paste of this kind?

A. That is correct. You can make a macaroon cookie from a kernel paste, similarly, you can make one from an almond paste. This is an economical substitute for an almond. We make macaroons with it.

Q. And it is generally used by the baking trade?

(Testimony of Jack M. Kaplan.)

A. That is correct, as well as the confectionery trade.

Q. Now, Mr. Kaplan, you stated, going back, that there are different classes. Is one class of kernels what is known as a regular apricot kernel?

A. Yes, that is right.

Q. Would you tell us what is the regular apricot kernel?

A. It is the kernel derived from the process of drying apricots. In the process of drying cots the pits are removed; these pits in turn are dried, cracked, to separate the nut meat from the shell, and the regular apricot kernel is basically one which is derived from the drying process of the fruit.

Q. Is another class of kernels known as the steamed kernel?

A. Yes, there is the steamed kernel, as well; in addition, there is a sulphured kernel. [17]

Q. What is the steamed kernel?

A. The steamed kernel, basically—it may also be referred to as a juice kernel; either terminology is applicable—is one which is derived, and here again basically, from a canning process, where the fruit has been cooked, such as to make pulp or to make juice, or to make, let's say, cooked apricots which are canned. The pit which is received from this process has been exposed to hot steam; the kernel has been modified slightly; that is, it contains less fats than one which would come from the drying process previously described. This kernel is referred to as a steamed kernel.

(Testimony of Jack M. Kaplan.)

Q. In other words, as I understand, then, the apricots themselves from which the pits have been derived, have been cooked; is that correct?

A. Basically correct.

Q. And the fruit and the pit have been subjected to heat? A. Correct.

Q. And they are called then steamed kernels; is that correct?

A. Steamed or juice kernels.

Q. Do they sell generally at lower prices than the regular apricot kernels? A. Yes.

Q. Then you mentioned a third class, sulphured kernels. What are they?

A. This is a kernel which is essentially derived from a process where, in drying the cot, the cot has been cut in half, [18] has been exposed to sulphur, both the fruit and the pit; that is to say the pit, the kernel in the pit has been exposed to sulphur, and such exposure has modified the quality of the kernel to a degree where it has less value and less use to us, similar to that of the steamed kernel case where the characteristic of the kernel has been modified due to heat, in this case, due to sulphur.

Q. In other words, the regular kernel is one that you might say is a natural kernel where the pit has not been subjected to heat or sulphur; is that correct? A. That is correct.

The Court: Why do they sulphur the apricots?

A. I don't know the answer to that, your Honor. I have no idea, but I do know that they use sul-

(Testimony of Jack M. Kaplan.)

phur in this process and we do know that the kernel itself——

The Court: Well, the kernel is out before they do that?

A. Not in this case, because, as I understand it, similar to the case of a certain variety of peach—I think it is the Blenheim peach—where in cutting the peach in half for canning, they cut not only the fruit, but they cut right through the kernel.

Q. (By Mr. Eisner): Through the pit, you mean?

A. Through the pit and the kernel in the pit. Then you have the same situation here in the sulphured cots; they cut through the fruit, the cot, cut it in half. In the process they cut [19] through the pit, so you have a fully halved apricot.

The Court: That is in apricots?

A. That is correct. Now, I wouldn't say—I wouldn't pursue this to the point of saying that I am an expert in this particular angle of the fruit end of it.

The Court: You want to be careful; I am a farmer.

The Witness: But it is my understanding specifically that the kernel itself—the kernel is where I am concerned—the kernel itself has been exposed to sulphur.

The Court: Well, that is after the pit is out of it.

The Witness: It is possible, but there again, as

(Testimony of Jack M. Kaplan.)

far as I am concerned, I am primarily concerned—maybe I should say entirely concerned—with the property of the kernel rather than the fruit, and that is where I can say that in my experience the kernel contains a certain amount of sulphur.

The Court: That has no relation here in relation to the merits of this case?

Mr. Eisner: No.

The Court: All right; proceed.

Q. (By Mr. Eisner): Mr. Kaplan, is the American Almond Products Company one of the large buyers of apricot pits, of apricot kernels?

A. To the best of my knowledge, it is the single largest buyer of this product in the USA.

The Court: That is all you have to do, is to look at the [20] witness here who indicates clearly that it is a prosperous business.

Q. (By Mr. Eisner): Mr. Kaplan, in July, 1955, did you have a conversation with Mr. Sternau of the Sunset-Sternau Food Company pertaining to apricot kernels? A. Yes, I did.

Q. Where did that conversation take place?

A. It took place in our plant in Brooklyn, and I think he had with him Mr. Astrack, who is the salesman for his broker, Prince, Keeler.

Q. And the conversation took place then, when you three were present, Mr. Sternau, Mr. Astrack and yourself? A. That is correct.

Q. Will you state as nearly as you can recall what was said in that conversation?

A. Mr. Sternau said that he would have approx-

(Testimony of Jack M. Kaplan.)

imately 75 tons of apricot kernels, and he had a small sample—a very small sample, probably several ounces at most—with him, which he had shown me, of such regular apricot kernels. He indicated that he had no price at the moment upon my questioning, but that since the market for the new crop would normally open some time within 30 or 40 days, he expected to have a price at such time.

I told him I would be very interested in getting his offer at the price when it was available, and that, further, [21] since I had never purchased apricot kernels from him prior to this time, that I would be interested in getting a type sample of about 200 pounds so that I could run a production test on this material in my plant to determine the type of nut meat that he had to offer in this regular apricot kernel transaction.

Q. Do regular apricot kernels vary in size, appearance and texture?

A. They definitely do. We have had many shipments from the most—probably the largest shippers—the largest, not probably; the largest shippers of this material in California, and in many instances we observe a great variety as to the characteristics of the regular apricot kernels, and that is why I asked Mr. Sternau to send me a 200-pound type sample shipment for determination as to the quality of the nut meats he had in mind to offer me.

Q. Did you look at the small sample that Mr. Sternau had with him and showed you at that time?

A. I did.

(Testimony of Jack M. Kaplan.)

Q. And how did the appearance of the small sample look?

A. It looked very, very good. It was very regular in appearance and in color and in size, and I might say at this point normal with reference to size, and I said it did not contain any noticeable amount of broken.

Mr. Eisner: Now, then, you have identified these. I think we might just as well offer these in evidence at this time, these samples. [22]

There is one sample here that is marked as sulphured kernels. Is that a sample of what you have referred to as kernels that have been in contact with sulphur?

A. That is correct.

Mr. O'Connor: May I see those, counsel?

Mr. Eisner: Certainly.

Q. By the way, these samples have been supplied you by Rosenberg Bros. and Company?

A. That is correct; they were mailed to your office at my request.

Mr. Eisner: And we will have them further identified, I will say to the Court.

We will ask that this be marked exhibit next in order.

The Court: Let it be admitted and marked next in order.

The Clerk: Plaintiff's Exhibit 33 admitted and filed in evidence.

(Thereupon the sample of apricot kernels

(Testimony of Jack M. Kaplan.)

referred to was marked Plaintiff's Exhibit No. 33 in evidence.)

Q. (By Mr. Eisner): I notice, Mr. Kaplan, that you have a carton here labeled "juice kernels." Are these kernels a sample of what you have referred to as steamed or juice kernels?

A. That is correct.

Q. And I show you another carton which is marked "regular kernels," and ask you if these are a sample of what are referred [23] to by you as regular kernels? A. That is correct.

Mr. Eisner: We offer these in evidence as next in order.

The Court: Let them be admitted and marked.

The Clerk: Plaintiff's Exhibits 34 and 35 admitted and filed in evidence.

(The samples of apricot kernels were marked Plaintiff's Exhibits Nos. 34 and 35 respectively in evidence.)

Q. (By Mr. Eisner): Now, Mr. Kaplan, after you had this conversation with Mr. Sternau to which you testified, what next occurred pertaining to this transaction in apricot kernels?

A. Well, I would say about a week later—I had no notice from either Mr. Sternau or his New York representative, that the 200 pounds I had requested were in transit to me, and I was anxious to get them, so I called Prince-Keeler; I spoke to one of the men of Prince-Keeler, and asked for some information as to whether the 200 pounds were going to be shipped to me; if so, when were they go-

(Testimony of Jack M. Kaplan.)

ing to be shipped to me, and I would say that I didn't hear anything further on this thing until approximately one month later. And I know it was about a month later, because around the end of August of 1955, it was the normal time for us to begin to make our purchases of that crop's apricot kernels, and I had made some purchases about the last week of August other than from Mr. Sternau, and [24] I had been reminded of the fact that I was still waiting for the 200-pound sample to consider a possible offer from Sunset-Sternau Company. So that at that time I called Prince-Keeler again—and that was at the end of August—and asked for some information as to the status of the 200-pound sample.

Q. Had any price been announced by sellers of apricot kernels at that time?

A. Yes. As I said, that was about the end of August, and as I have said, I had made some purchases. I actually purchased from California Packing Corporation; I had purchased under two separate transactions the latter part of August a total of about three cars of 35 tons each at $17\frac{1}{2}$. And I notified Prince-Keeler that I had made some purchases of new crop kernels. As a buyer, I indicated to him that I thought the market was about 17 cents, but actually I had purchased at $17\frac{1}{2}$, and asked for any prospective offerings at such 17-cent price.

Q. That was about the first of September, 1955?

A. I would say it was a little earlier than the

(Testimony of Jack M. Kaplan.)

first, because I have a record of having received a sold note dated the first, and undoubtedly I had indicated a possibility of doing business at 17. And subsequently I was notified by Prince-Keeler that they had received a direct offer; that is to say, they were giving me a firm offer for Sunset-Sternau of approximately 75 tons of regular apricot kernels at a price of $17\frac{1}{2}$, which [25] I accepted at $17\frac{1}{2}$; and I indicated that, since I had not yet received the 200-pound type sample, which was allegedly in transit to me, this transaction would be subject to my acceptance of the sample upon arrival for approval of the nut meat quality type. And I duly received an acknowledgment in that I had gotten a sold note, or, in my case, it would be a bought note copy, dated September 1st, confirming this transaction.

Q. This is the original bought note that you received from Prince-Keeler and Company?

A. That's correct.

The Court: What was the high price that nut season?

A. Well, that crop year it went up to 43 cents.

The Court: It only indicates you are a good buyer.

The Witness: It was a very unusual circumstance.

Mr. O'Connor: A fire destroyed most of the available crop in the United States.

The Court: In the plant?

Mr. O'Connor: In a plant down in San Jose.

(Testimony of Jack M. Kaplan.)

The Court: About what stock did they have?

Mr. O'Connor: Hundreds of thousands of tons.

Mr. Eisner: They were the large producer of this commodity, Sewell Brown.

The Witness: They were not only a large producer, but they also did a lot of cracking of other parties' pits as a [26] processor, and there was a great deal of that in the fire, as well as their own material.

Mr. Eisner: We offer this bought note in evidence as Plaintiff's exhibit next in order.

The Court: Let it be admitted and marked.

The Clerk: Plaintiff's Exhibit 36 admitted and filed in evidence.

(The bought note referred to was marked Plaintiff's Exhibit No. 36 in evidence.)

Mr. Eisner: And this bought note is identical with the sold note that has already been read into the record.

The Court: It is already in?

Mr. Eisner: I say this is a bought note and it is identical with the sold note that was delivered by the broker. In other words, the broker delivered a bought note to the buyer and a sold note to the seller, and the two are identical with the exception that one is called a bought note and the other a sold note. It is a broker's memorandum.

Q. And did you retain this bought note, Mr. Kaplan?

A. I certainly did. It was of extreme importance to me to keep an excellent record of all such

(Testimony of Jack M. Kaplan.)

memorandums, and we had of course a quantity of similar ones from other parties.

Q. You stated that at the same time, at the end of August, this same time, you bought at the same price, 17½ cents, regular apricot kernels from others? [27] A. That is correct.

Q. Do you have the contracts there?

A. Yes, I do. Here is one for 140,000 pounds; here is one for 70,000 pounds dated that last week of August; two separate transactions at different dates.

Mr. Eisner: We are going to offer these in evidence, and I will state to the Court the purpose for which I am offering them. These are contracts at exactly the same price for exactly the same commodity, regular apricot kernels, that this contract was given for, and these contracts show upon their face that the percentage of broken kernels were not to exceed five per cent, showing it is a custom of the trade, the purpose being to show that the American Almond Products Company was purchasing at the same price, for 17½ cents, the same product from the Sunset-Sternau Food Company. That is the purpose of the order.

The Court: Let them be admitted and marked next in order.

The Clerk: Plaintiff's Exhibit 37 admitted and filed in evidence.

(The contracts referred to were marked Plaintiff's Exhibit No. 37 in evidence.)

(Testimony of Jack M. Kaplan.)

Q. (By Mr. Eisner): After the receipt of this bought note, did you receive the two bags or the 200-pound sample that you had asked for?

A. Yes, I would say about one week later actually we did [28] receive two 100-pound bags, and as was our intent, we actually put one bag into a production test; that is to say, we made kernel paste of this material, as I previously described, kernel paste, and, further, we took the kernel paste and made macaroon cookies of the paste.

That was important to us because, in addition to looking at the raw material and examining them superficially for many characteristics we were interested in, we wanted to run this production test, because we find that one of the critical methods of determining nut-meat quality of a kernel is to make a macaroon; that is to say, if we have a poor grade kernel, the macaroon will not rise properly, or it will not have a proper color; it will run; it will lack shape.

And we have had many cases of experience in the past where we made kernel paste of poor quality regular apricot kernels where we had a great deal of difficulty. So that we learned from our own past experience that where we were in the slightest way doubtful about the quality of a regular kernel, to run this critical bake test to determine the type of regular kernel nut meat.

Q. And you did that in this instance?

A. We did so.

(Testimony of Jack M. Kaplan.)

Q. What was the result of your test and your examination of the quality of the 200-pound sample?

A. We found that the regular apricot kernels in this sample [29] were perfectly good.

I accordingly called Prince-Keeler and notified them that we accepted the sample from the point of view of type of kernel nut meat; however, we did notice that in this two-bag sample that there was an excess of five per cent broken kernels. I would say at this time that possibly there was a percentage of seven per cent or eight per cent maximum. At this point we didn't measure it, because we didn't feel it was very pertinent, since it was uniformly the practice of the trade, for 25 years or more than I know of, and certainly for ten years that I had direct knowledge of this matter, that regular apricot kernels by uniform practice never had more than five per cent by weight of broken kernels and/or shells.

So that I merely informed Prince-Keeler—one of the men there; it may have been Frank Sullivan—that I accepted the sample to be good type nut meat, but I cautioned him to be advised of the fact that the normal practice of maximum percentage broken was five per cent, and that, since in many cases this implied understood warranty was actually stipulated on contracts—it was a fluid, flexible matter, but since in many cases it was specified on contracts, that I would prefer in this matter that it be similarly stipulated, since this was the first

(Testimony of Jack M. Kaplan.)

time I had purchased from this seller, and I wanted no confusion about this matter.

Q. In this same conversation did Mr. Berke tell you that they [30] had received the forms of formal contracts from Sunset-Sternau?

A. Yes, they did. I had received a letter—actually a copy of a letter—dated September the 8th from Prince-Keeler Company signed by Mr. Sullivan to Sunset-Sternau dated the 8th, and because during this conversation I have just described, Mr. Sullivan indicated to me that he had just received that day from the principals, Sunset-Sternau Company, copies of the more formal contract applying to the 75-ton kernel transaction, and that since I had requested that they make specific mention of five per cent broken, then he would accordingly return the more formal contract to the maker for such insertion.

And accordingly, I had received from his office, a copy of the letter transmitting those contracts to the seller for the purpose.

Q. What date is that letter?

A. That is September 8, 1955.

Q. And that is Plaintiff's Exhibit No. 10 in evidence. All right. So you received a copy of Plaintiff's Exhibit No. 10 in evidence from Prince-Keeler and Company?

A. That is correct.

Q. You referred to this trade custom. You said that trade custom has existed in connection with regular apricot kernels as long as you have been

(Testimony of Jack M. Kaplan.)

engaged in business? A. That's correct.

Mr. O'Connor: Just a minute, if the Court please.

This is the plaintiff's direct case. However, as I understand the law, trade custom and usage, testimony of trade custom and usage depends for its admission upon a knowledge of that trade custom and usage by all parties to a contract. And I would ask in this type of procedure—so that I won't have to object to it as it goes along and interrupt counsel and take the time of the Court—that all testimony regarding trade custom and usage, so far as the plaintiff's case is concerned, be subject to a motion to strike upon a showing or upon any evidence or proof that trade custom and usage was not understood or known to all parties to this particular transaction to which they are attempting to attach it.

Mr. Eisner: Have you finished, counsel?

Mr. O'Connor: Yes, with this one further statement. I may state this, if the Court please: It has already preliminarily appeared in the examination of this witness that he knew that Sunset-Sternau, through his conversation with Mr. Sternau, had not engaged previously in the sale of this particular item and were not accustomed to selling this particular item, had no experience, and therefore I would conclude that he had no knowledge of the trade custom or usage.

Mr. Eisner: I am sorry to say that counsel has an incorrect understanding of the law; that when one deals in a commodity in which a general cus-

(Testimony of Jack M. Kaplan.)

tom exists, whether he knows the custom or he doesn't know the custom, he is bound by the custom, [32] and he is conclusively deemed to know the custom when he engaged in this transaction in this commodity, whether he is familiar with it or not. When the time comes, if it ever becomes pertinent to that, I have the authorities here.

The Court: So that both parties will be protected, let the testimony go in, subject to a motion to strike.

Mr. O'Connor: Very well, your Honor.

Q. (By Mr. Eisner): I think you have testified to what the trade custom is, Mr. Kaplan, so I won't press that.

I will ask you this question: Do broken kernels have a less market value than whole kernels?

A. To my knowledge, considerably less. And, as a matter of fact, I can only say to my knowledge, because we never buy broken kernels; but I understand that they are normally sold for oil crushing purposes at a fraction of the value of regular kernels.

Q. Do broken kernels meet with the requirements of your business?

A. Absolutely not.

Q. Will you explain to the Court the reason for that—you stated that you make the kernels into paste—so the Court will understand why you cannot use broken kernels in manufacturing the kernels into paste?

A. Well, as I have indicated, the process basic-

(Testimony of Jack M. Kaplan.)

ally is one of removal of skin, then pulverizing, in normal procedure. [33] Now, in the removal of the skin——

The Court: Of the meat itself?

A. That is correct. In the removal of skin, the process employed is one, first, where we water soak the nut meat to loosen the skin from the nut meat and dissolve the gums; secondly, the water moist kernels are then put through a friction device where by friction the skins are slipped from the nut meat. After this has happened, the material drops through a duct, which is subjected to an air blast. This air blast is strong enough to throw out or reject the skin but not strong enough to throw out the nut meat.

Now, you can readily see that if we had a great deal of broken or small pieces of kernels in this procedure, the small kernels would be similar in weight to the skin; that is, they would be much lighter than the larger regular size, and they similarly would be thrown out with the refuse, so that it is a costly matter for us to consider, from any point of view, using any broken kernels. And that is why it is of great significance to us, as it is to the rest of the trade, for the same reason, and that's why they go at a discount.

Q. What next occurred in this transaction after you advised Prince-Keeler and Company of your approval of the sample?

A. Well, normally—and this had been the case in 1955 with many transactions I had with Prince-

(Testimony of Jack M. Kaplan.)

Keeler—normally a week or two or even longer goes by between the time we make [34] some confirmation of a transaction and we get a formal contract for execution. This is in the height of the buying and selling season. I am very busy; the broker is very busy; so that a week or more or two weeks would go by between such a transaction and its formal confirmation.

In this case about a week or more had gone by, and prior to receiving such formalization of this matter, a fire occurred. As I remember it, it was a Sunday. I heard about it Monday morning—Monday morning, the 19th of September. A fire had occurred in Los Gatos at the Sewell Brown plant, as I have previously described.

When I heard about this fire, I was immediately alerted to various obvious possibilities: number one, what percentage of the crop had been burned. I had not covered for my entire year's requirements. What possibility would there be that I would *no* sufficient quantity left after a fire to cover properly? What would happen to the price of this remainder?

I found it extremely important to go to the location of the fire and to determine at first hand the consequences of this situation. In addition to which, I had contracts for this material from, among other people, California Packing at this date—no, not California Packing — in addition to California Packing, at this date, from Mayfair Packing, who normally would have his pits cracked at the Sewell

(Testimony of Jack M. Kaplan.)

Brown plant, as well as pits contracted from Sewell Brown Company, [35] and I was most anxious to determine the status of the pits I had contracted with these people, in addition to the other considerations.

Q. By "most of these people," whom do you mean?

A. Sewell Brown Company, Mayfair Packing, as well as additional possible purchases to be made. So that I immediately made arrangements to come to the site of the fire, and I did so arrive here about September 21st or 22nd, something like that.

Q. In other words, you came from New York?

A. I came from New York.

Q. To California, about September 21st?

A. That's correct.

Q. While you were here in California, did you receive a telephone message from Prince-Keeler and Company?

A. Yes, I had already been here a day or so——

Mr. O'Connor: Just a moment, if the Court please, I will submit the question calls for obvious hearsay, a telephone conversation with Prince-Keeler and Company.

Mr. Eisner: It isn't hearsay at all.

The Witness: I have confirmation of it in writing, for that matter.

Mr. Eisner: Just a moment, Mr. Kaplan.

It isn't hearsay at all. When you hear it, you will find out it was a request by Prince-Keeler and Company to Mr. Kaplan, [36] that he get in touch

(Testimony of Jack M. Kaplan.)

with Mr. Sternau and see if he could help Mr. Sternau out in getting his apricot pits cracked.

Mr. O'Connor: Do you want to testify, counsel?

Mr. Eisner: No.

Mr. O'Connor: I will submit my objection, if the Court please, it is hearsay. It is telephone conversation between this man and another party not in the presence of the defendant or any representative of the defendant.

The Court: I will allow it in subject to your motion to strike and over your objection. Unless it is connected up, I will grant your motion.

Q. (By Mr. Eisner): Mr. Kaplan, did you have such a telephone conversation?

A. I'm sorry; would you repeat that question?

Q. Did you have such a telephone conversation?

A. With whom? The original question again?

Q. With Prince-Keeler and Company?

A. Yes, I did.

Q. Were you in San Francisco?

A. I was in George Wright's office at the time the message was given to me by Mr. George Wright's secretary. The call had been received in his office for me. Apparently Prince-Keeler had tried to locate me; they called my office; they were informed to contact me through Mr. Wright's office.

Q. Did you contact Prince-Keeler and Company on the phone? [37] A. Yes, I did.

Q. All right. Did you have a telephone conversation? A. I did.

Q. What was the telephone conversation?

(Testimony of Jack M. Kaplan.)

A. I spoke to Mr. William Berke.

Mr. O'Connor: Just a minute. If the Court please, apparently this witness is reading from notes that he has before him. If he is reading from notes, I want to look at the notes. I think I am entitled to see those notes.

Mr. Eisner: He is not reading from notes; he has a letter there.

Mr. O'Connor: I am certain he is reading something up here, counsel. I have a right to look at them. He is refreshing his memory.

The Witness: You can have the whole file (handing papers to counsel).

Q. (By Mr. O'Connor): Are you testifying from these letters, Mr. Kaplan?

A. No, sir. I am using the letters to refresh my memory of events which occurred in 1955.

Q. (By Mr. Eisner): Mr. Kaplan, will you testify—tell us what the telephone conversation was, as nearly as you recall?

A. Mr. Berke advised me that he had received a letter from Mr. Sternau and that he wanted me to listen to him read the letter verbatim word for word, and he then so read the letter [38] to me over the phone. He thought it was important enough for me to know about this letter, particularly since I was in California, and possibly I might be able to react to the information to the benefit of all concerned; and he further indicated that he would send a copy of this letter he had received to my office upon my request. I thought

(Testimony of Jack M. Kaplan.)

it was important enough, and I requested him to confirm this telephone conversation by writing my office of the nature of this conversation, and quoting the letter he had received. I thought it was that significant.

Q. Did you thereafter receive a letter at your office from Prince-Keeler and Company?

A. Yes, I did.

Q. Is this it?

A. This is the correspondence.

Mr. Eisner: You have seen it, counsel. Would you want to see it again?

Mr. O'Connor: I haven't read it.

Mr. Eisner: We offer this letter in evidence as Plaintiff's Exhibit next in order.

The Court: Let it be admitted and marked next in order.

The Clerk: Plaintiff's Exhibit 38 admitted and filed in evidence.

(Letter, Prince-Keeler to American Almond Products dated September 23, 1955, marked Plaintiff's Exhibit No. 38 in evidence.) [39]

Mr. Eisner: I will read this letter. It is dated September 23, 1955, on the letterhead of Prince-Keeler and Company (reading exhibit).

And annexed to this letter is a letter dated September 21st from S. M. Sternau, which is Plaintiff's Exhibit No. 11 in evidence.

Mr. O'Connor: I notice it is five minutes past four. Does your Honor wish to take an adjournment until Monday? I am in this position: I have

a sale of property in an estate set for 4:30 o'clock this afternoon.

The Court: Today?

Mr. O'Connor: Yes.

The Court: We will take an adjournment until Monday morning at 10:00 o'clock.

(Whereupon an adjournment was taken until Monday, February 25, 1957, at 10:00 o'clock a.m.) [40]

Monday, February 25, 1957—10:00 A.M.

The Clerk: American Almond Products Company versus Sunset-Sternau Food Company, further trial.

JACK M. KAPLAN

a witness called by and on behalf of the Plaintiff, resumed the stand and testified further as follows:

The Clerk: Jack M. Kaplan to the stand, heretofore sworn.

Direct Examination—(Continued)

Q. (By Mr. Eisner): Mr. Kaplan, I believe at the time of adjournment I was just about to ask you regarding a telephone conversation that you had with Mr. Sternau at the Sunset-Sternau Food Company when you were in San Francisco in the month of September, 1955; is that correct?

A. That is correct.

Q. Mr. Kaplan, did you have such a telephone conversation with Mr. Sternau? A. I did.

The Court: Who is Mr. Sternau? Identify him.

Mr. Eisner: Mr. Sternau is a defendant, if the

(Testimony of Jack M. Kaplan.)

Court please, as is Sunset-Sternau Food Company, and Mr. Sternau is President of it.

The Court: All right; proceed.

Q. (By Mr. Eisner): Where were you, Mr. Kaplan, when you telephoned to Mr. Sternau? [41]

A. I was in San Francisco, in the office of Mr. George Wright.

Q. And when did that conversation take place?

A. That took place September the 23rd. I have a letter confirming the date.

Q. September 23rd, 1955? A. 1955.

Q. Will you state as nearly as you can recall the substance of that conversation?

A. I called Mr. Sternau, advised him that I had received a telephone call from New York from Prince-Keeler and that they had read his letter to me, and that at Mr. Berke's suggestion I was speaking with him now to see what possibly could be done.

Mr. Sternau said to me, that, as a result of the fire at the Sewell Brown plant, he was having difficulty cracking the kernels—his kernels.

I said to him that I was in California at the moment because I had purchased kernels from Sewell Brown Company and Mayfair Packing Company and the California Prune and Apricot Association; in each of these cases there were some of these kernels which I had purchased, possibly directly or indirectly, involved in the fire, and that I had been making attempts to clarify that situation and I possibly could help him with his problem;

(Testimony of Jack M. Kaplan.)

that undoubtedly I could get the cooperation of California Packing Company or Rosenberg Bros. and Company in cracking any kernels that he had uncracked, and I [42] asked him if that would be of some help to him. And he said well, he would appreciate it very much. He indicated that he would be very appreciative if I could arrange that for him. I said I would try it; I would notify him after I had spoken to these parties.

I then called——

Q. That was the substance of that conversation?

A. Of that particular conversation.

Q. After that conversation did you get in touch with California Packing Corporation?

A. I did.

Q. What did you do in that respect?

Mr. O'Connor: Just a minute. If the Court please, I submit that if this is going to involve the conversation of third parties, that it will be hearsay.

Mr. Eisner: We are not trying to prove any fact by this conversation; we are just seeking to show that the witness did telephone or make arrangements with California Packing Corporation, and I will follow that with another telephone conversation to Mr. Sternau. We are not trying to prove any fact by the conversation.

The Court: Very well. I will allow it.

A. I did. I spoke to Mr. Glenny—Mr. Carroll Glenny, who was the sales manager of California

(Testimony of Jack M. Kaplan.)

Packing Company. I said to Mr. Glenny that I would like—— [43]

Mr. O'Connor: The objection goes to this telephone conversation. It calls for hearsay.

The Court: What he said would be hearsay clearly.

Mr. Eisner: We are not trying to prove any fact by it, if the Court please.

Mr. O'Connor: Well——

Mr. Eisner: I won't press it.

Q. You did have a telephone conversation with Mr. Carroll Glenny of the California Packing Company?

A. Yes, and I sent him a letter subsequently concerning that conversation.

Q. Thereafter, after having that telephone conversation with Mr. Carroll Glenny of the California Packing Corporation, did you have another telephone conversation with Mr. Sternau?

A. I did.

Q. All right. How long after the first telephone conversation with Mr. Sternau to which you have testified, did you have this second telephone conversation with Mr. Sternau?

A. I would estimate that it was within the hour——within an hour's time.

Q. Did you call Mr. Sternau again on the telephone? A. I did.

Q. And would you now state the substance of the conversation that you had with Mr. Sternau on this second occasion?

(Testimony of Jack M. Kaplan.)

A. I told Mr. Sternau that I had gotten the co-operation of the [44] California Packing Corporation insofar that they would be glad to crack the pits for Mr. Sternau at a toll charge and labor charge, which they would finalize after conferring with Mr. Sternau; that it would be done at some later period; that he requested—Mr. Glenney requested that Mr. Sternau contact his plant manager, Mr. Engell, to finalize the charge and the date of this crack out.

Mr. Sternau indicated to me that he was very *appreciate* of this and he assured me that I would get delivery of the kernels subsequent to the processing and the crack out.

Q. That was the substance of that conversation?

A. That is correct.

Q. Did you then shortly thereafter return to New York? A. I did.

Q. And when you returned to New York did you make any report to Prince-Keeler and Company pertaining to the conversations that you had had with Mr. Sternau?

A. I did. I spoke to Mr. Berke and Mr. Astrack of that office and described the conversations and the arrangements we had arrived at as previously described.

Mr. O'Connor: Just a moment. If the Court please, I had assumed that he would confine his answer to the question asked. I move to strike out the latter part of the conversation as to any conversations he had with Prince-Keller and Company

(Testimony of Jack M. Kaplan.)

in New York, as being hearsay and not binding upon the defendant. [45]

Mr. Eisner: Prince-Keller and Company, if the Court please, was the agent through whom the sale was negotiated, and furthermore, it is really preliminary because I am just about now to refer to a letter that Prince-Keeler and Company wrote him.

The Court: Go directly to the letter. Sustain the objection.

Mr. O'Connor: The statement of counsel that Prince-Keeler of New York is an agent of Sunset-Sternau is a gratuitous statement of counsel, of course, your Honor. Whether they are, or are an agent of American Almond Products, the plaintiff, will have to be determined by the Court from the evidence before it.

Mr. Eisner: The evidence is here in the record.

The Court: There is nothing before me. You may proceed.

Q. (By Mr. Eisner): Mr. Kaplan, did you thereafter receive from Prince-Keeler and Company a copy of a letter which Prince-Keeler and Company had written to Sunset-Sternau pertaining to the arrangements made by you?

A. Yes, I did. I have such copy dated September 28, which was forwarded to my office and marked for my attention.

Mr. O'Connor: I have a copy.

Mr. Eisner: You have that. The original of this letter is already in evidence, but I am going to

(Testimony of Jack M. Kaplan.)

introduce this copy [46] because it is the copy that this witness received.

Mr. O'Connor: I will stipulate that it doesn't have to be introduced; counsel can use the original, which is Plaintiff's Exhibit No. 12, so the record will not be confused.

Mr. Eisner: All right.

The Court: That is sufficient for all purposes.

Mr. Eisner: Very well, I will just refer to this letter then. It is Plaintiff's Exhibit No. 12 in evidence, and this letter just states, if the Court please:

"Just finished speaking to Mr. Jack Kaplan of American Almond Products Company, who advised me that you had agreed to the following during your discussion with him on his recent visit to California:

"It is understood, due to the fact that you have no shelling facilities for apricot kernels, that it has been arranged through the kindness of Mr. Carroll Glenney of Calpak, for Mr. Engell, Calpak's plant manager, to shell the apricot kernels which we sold American Almond for your account.'

"It certainly was fortunate that Mr. Kaplan has connections in Calpak; otherwise we would have been in a mess with this good buyer. Jack Kaplan was most cooperative in this matter.

"We will appreciate your keeping us informed [47] concerning shipping information in this matter."

(Testimony of Jack M. Kaplan.)

Q. Mr. Kaplan, what next occurred in connection with this transaction?

A. Well, I called Prince-Keeler the latter part of October, October 21st, and asked if they had received any confirmation of shipping arrangement with reference this contract which called for first shipment October 31st approximately, because I had had no knowledge up to this time of any shipping arrangements having been in process or concluded.

Q. Mr. Kaplan, on October 25, 1955, did you write a letter to Mr. Sternau?

A. I did. I wrote a letter which referred to the original conversation I had with him in September requesting any—directly from him, any information he could give me with reference to the status of these apricot kernels to be shipped to me.

Mr. Eisner: You have the copy of that letter. If the Court please, a photostatic copy of that letter is in evidence as Exhibit 15, and just referring to it, so the Court will have it in mind, this is the letter that Mr. Kaplan wrote to Mr. Sternau:

“Dear Mr. Sternau:

“With reference to our contract for apricot kernels of 9/1/55, you recall that on my recent trip to California we had an opportunity to talk about the [48] matter on the phone. At that time, you indicated to me as a result of Sewell Brown Co. loss of cracking plant by fire, you were attempting to accomplish your crack out of pits with other people, and asked if I could be of some help.

(Testimony of Jack M. Kaplan.)

“As you know, I immediately obtained the co-operation of California Packing Corporation. Mr. Carol Glenney stated that he had arranged with Mr. Engell (Calpak plant manager) to accomplish the crack out for your account at some future date which would be convenient for both parties—details to be finalized between you subsequently.

“At this time I would appreciate hearing from you as to the existing arrangements, insofar as we might be posted on approximate shipping dates of kernels on contract.

“We do not mean to press you for prompt shipment, but we do need some confirmation from you on the approximate schedule in order that we may plan our own affairs intelligently.

“Please be kind enough to give us a prompt reply and accept our thanks for same.”

Q. Mr. Kaplan, what next occurred in this matter?

A. I heard nothing further for several days, and on November 1st I phoned Prince-Keeler and Company, advising them that I [49] had not received any information as a result of my request for it, and that at this time I was going to make a written demand for the delivery, and that unless I had some immediate action on this, I would formally indicate that I would take action for breach of contract.

And I wrote such a letter confirming this conversation to Prince-Keeler.

(Testimony of Jack M. Kaplan.)

Q. And you wrote that letter to Prince-Keeler and Company? A. Right.

Q. Was that letter dated November 1st, 1955?

A. It was.

Mr. Eisner: And that letter, if the Court please, is Plaintiff's Exhibit No. 22, and just referring to it, it reads as follows:

"This confirms our telephone conversation this day. We refer to your bought note 9-12079 of 9/1/55. As you know from the many attempts made both by your office and ourselves, which include your telegram of October 21st, and our letter to your principal of October 25th, we have been patiently waiting for some acknowledgment of scheduled shipments with no results accomplished to date.

"Subject contract calls for first shipment by October 31, 1955. We have no alternative on this date, other than the following: [50]

"We hereby notify you officially that unless we have a reply concerning shipment due us, we shall take immediate action against shipper of his breach of contract by failure of delivery."

Copy of that letter was sent by Prince-Keeler and Company to the defendant.

Q. Mr. Kaplan, what next occurred in this matter?

A. I next received a letter from Prince-Keeler and Company under date of November the 3rd, which in turn quotes from a letter of Sunset-Sternau to Prince-Keeler dated October 31st.

(Testimony of Jack M. Kaplan.)

Q. Do you have that letter? A. I do.

Mr. Eisner: I am going to offer this in evidence, counsel. A copy of it is in evidence.

The Witness: Those enclosures were received with the letter, as you see it.

Mr. Eisner: Yes. I am going to offer this letter in evidence, if the Court please.

The Court: Let it be admitted and marked next in order.

The Clerk: Plaintiff's Exhibit 39 admitted and filed in evidence.

(Letter dated November 3, 1955, from Prince-Keeler to American Almond was marked Plaintiff's Exhibit No. 39 in evidence.)

Mr. O'Connor: What previous exhibit is that, counsel? [51]

Mr. Eisner: I will look in a moment, counsel, when I get the date of it. I am not quite sure looking at it.

If the Court please, this is upon the letterhead of Prince-Keeler and Company, Inc. It is dated November 3, 1955.

(Reading letter.)

Then there was also annexed to this letter a carbon copy of a letter that Prince-Keeler and Company wrote to Sunset-Sternau Food Company reading as follows:

(Reading letter.)

Then another carbon copy annexed to that dated November 3, 1955.

(Reading letter.)

(Testimony of Jack M. Kaplan.)

Q. (By Mr. Eisner): Mr. Kaplan, after receiving this letter from Prince-Keeler and Company with its enclosures, what next occurred?

A. Well, I received this on November the 4th and I sent a letter to Prince-Keeler acknowledging receipt of this letter and indicating further——

Q. Just when did you send that letter?

A. November 4th.

Q. November 4th. Do you have a copy of that letter? A. I do.

Mr. Eisner: I believe this is in evidence. Just a minute, I don't see it.

We offer this carbon copy of this letter into evidence, if the Court please. [52]

The Court: Let it be admitted and marked.

The Clerk: Plaintiff's Exhibit 40 admitted and filed in evidence.

Mr. O'Connor: What is the date of the letter, Mr. Eisner?

Mr. Eisner: November 4th, 1955.

(Mr. Eisner thereupon read the letter from American Almond Products to Prince-Keeler and Company, dated November 4, 1955, which has been marked Plaintiff's Exhibit No. 40 in evidence.)

Q. (By Mr. Eisner): Now, Mr. Kaplan, after receipt of the letter of November 3rd and your letter of November 4th, 1955, what next occurred?

A. I received another letter from Prince-Keeler and Company under date of November 7th, and I will give you the original of that letter.

(Testimony of Jack M. Kaplan.)

Mr. Eisner: This letter is in evidence—a copy of the letter, I believe.

Mr. O'Connor: That is Plaintiff's Exhibit 26, I believe, counsel.

Mr. Eisner: No, this is not the letter, counsel.

Mr. O'Connor: November 7th?

Mr. Eisner: November 7th. I will just offer this in evidence.

The Court: Let it be marked next in order.

The Clerk: Plaintiff's Exhibit 41 admitted and filed in evidence.

(The letter dated November 7, 1955, Prince-Keeler and Company to American Almond Products Co. was marked Plaintiff's Exhibit No. 41 in evidence and was read by Mr. Eisner.) [53]

Q. (By Mr. Eisner): Mr. Kaplan, after receipt of this letter of November 7th, what next occurred?

A. Well, I waited a period—I waited for the period of ten days to expire, as described in this letter, and nothing happened. And at that point I decided to come to California and see first-hand what I could do to straighten this matter out, if anything at all, and I made plans to come to California at that time.

Q. And when did you arrive in California?

A. As best I recall, it was November the 14th, a Monday.

Q. 1955? A. 1955.

Q. And what next occurred?

(Testimony of Jack M. Kaplan.)

A. Well, I called Mr. Sternau from your office. I was in your office at the time; I called Mr. Sternau on the telephone and I had a conversation with him.

Q. Can you state——

A. I have notes, by the way, of these. At this time I began to take detailed notes of the transactions that were occurring, because I strongly suspected that I might need some recollection of these things at a later date, and I have notes of these conversations.

Q. You made the notes at the time?

A. That is correct.

Q. At the time that these conversations took place? [54]

A. Right.

Q. Will you state the substance of the conversation that you had with Mr. Sternau?

A. Yes, I will.

Mr. O'Connor: If the witness is going to use some notes, I would like to examine some notes.

The Witness: Surely.

Mr. O'Connor: May I be accorded the privilege of seeing them?

Mr. Eisner: No objection.

Q. Those notes are in your own handwriting?

A. They are, made at that same day. They were made in the evening of that day. I was at a hotel here and used the hotel stationery to put into diary form, so to speak, the conversation of the day—the transactions of the day.

Q. Mr. Kaplan——

(Testimony of Jack M. Kaplan.)

The Witness: By the way, I have additional notes for the next day's transactions, if you want to look at those, counsel, while you are here.

The Court: What is this day the witness is referring to?

The Witness: The day subsequent to this, which was the 15th, where we had an appointment with Mr. Sternau in Modesto, and from which point we went to speak with Mr. Bonzi at his attorney's office—Mr. Prince, I believe his name was. That was the day that occurred. I have notes on those transactions. [55]

Q. (By Mr. Eisner): Mr. Sternau was present? A. That's correct.

Mr. O'Connor: Let me see those notes.

A. Surely. That is November 15.

Mr. Eisner: It is a good thing you are not trying to read my notes, counsel.

Mr. O'Connor: If the Court please, so far as the qualification of the witness to talk from notes is concerned, I would ask leave of Court to direct a few questions to him; that is, as to his right to read these notes and refresh his memory on the witness stand from these notes.

Mr. Eisner: I do not quite follow you.

Mr. O'Connor: I want to question his qualification to use the notes as a means to refresh his memory.

Mr. Eisner: Yes. It is subject to qualification that they are proper means of refreshing memory, and the determination of when they were written

(Testimony of Jack M. Kaplan.)

with respect to the events in relation to the notes.

The Court: As far as the evidence discloses, he has already testified that the first notes presented were written at his hotel that evening on the day that he had that conversation.

Mr. O'Connor: Yes, he did, just as far as the first notes were concerned. I might just shorten it up by asking when he made these notes. [56]

The Court: Very well.

The Witness: The evening of the 13th, similarly the evening of the events of the day.

Q. (By Mr. O'Connor): Where were they written?

A. I didn't hear the question.

Q. Where did you write them?

A. Where were they written?

Q. Yes.

A. They were written at the hotel; I believe you will see that it is on hotel stationery. At the time I was at the Hotel Sutter and used the stationery of that hotel.

Q. In the evening of that day?

A. That is correct.

Q. And that was after you returned from Modesto?

A. That is correct. You have there notes of the 15th. I have here notes of the 14th, and the same evening I sent a telegram to my New York office confirming the events of the day. I have the original of that telegram here.

(Testimony of Jack M. Kaplan.)

Mr. O'Connor: That is a self-serving document. We won't bother with that.

I would like, while you are questioning the witness on these notes of the 14th, I would like to have a chance to read these; it might speed up things.

Mr. Eisner: All right.

Q. Now, Mr. Kaplan, you may refer to the notes that you made [57] of your conversation of the 14th for the purpose of refreshing your recollection. And will you state now the substance of the conversation that you had with Mr. Sternau?

A. Mr. Sternau told me immediately that I would get delivery of my kernels; that Sunset-Sternau had never yet fallen down on a contract, and above all, I should remember that I would get delivery here.

He continued further, saying that a Mr. Rudy Bonzi was in possession of the kernels in the form of pits uncracked; that Mr. Rudy Bonzi had these pits, they were in his possession; and that he was obtaining—taking measures to obtain—to get these kernels from Bonzi; he had been busily at it for several days and that Mr. Bonzi had an agreement with Mr. Sternau which was a verbal agreement—and apparently he had made an attempt *to this* verbal agreement reduced to writing, and Mr. Bonzi and Mr. Sternau——

Q. Just state the conversation.

A. That was all in the conversation. Mr. Bonzi and Mr. Sternau, had, in the presence of Mr.

(Testimony of Jack M. Kaplan.)

O'Connor, discussed the question of reducing this agreement to writing, but Mr. Bonzi had refused to do so, and had refused further to give any indication as to what date of delivery would be applicable here as to giving the kernels to Sunset-Sternau Company. He refused to give a specific date of delivery, but he agreed he had a verbal agreement with him. [58]

And he indicated further that Bonzi had an additional quantity of kernels, or of pits in this case—apricot pits—which were sold to Continental Nut Company, but this particular lot which was sold to Continental Nut Company had nothing to do with the apricot pits involved in the arrangement with Mr. Sternau.

And he further advised me that Mr. Raymond O'Connor, his attorney would give me any further information I wanted reference this matter, and that was the end of that conversation, except that I might say we indicated that we would arrange to meet together the next day in Modesto.

Q. You made arrangements for an appointment? A. Right.

Q. The next day did you go to Modesto?

A. We did.

Q. Who went?

A. You did, Mr. Eisner. You and I went together; we went to Modesto and saw Mr. Sternau at his office there.

Q. All right. Did a conversation take place with Mr. Sternau?

(Testimony of Jack M. Kaplan.)

A. It did, and I have a great many notes on that now in possession of Mr. O'Connor.

Q. While Mr. O'Connor is looking at that, I will ask you another question, Mr. Kaplan.

When you were here in September on your prior trip, did you purchase apricot kernels—regular apricot kernels—at that [59] time?

A. Yes, I did.

Q. And at what price were you able to purchase regular apricot kernels at that time?

A. Talking about my September trip?

Q. Yes.

A. I purchased on September 23rd from Rosenberg Bros. five cars, 35 tons each, of regular apricot kernels, at 28 cents per pound.

Q. 28 cents? A. 28 cents per pound.

Q. Turning now, Mr. Kaplan, to the conversation that was held in Modesto in the presence of Mr. Sternau, referring to your notes to refresh your recollection, will you please state what transpired at that meeting and conversation?

A. Well, we met Mr. Sternau in his office in Modesto, and you were present, and Mr. Sternau immediately told us that Bonzi had enough pits still in his possession on his premises in the area to crack out and deliver to us the 75 tons of kernels, referring to our contract; they were still in existence and which were sold to us.

As a matter of fact, he indicated further that he himself—Mr. Sternau himself—had 60 tons of wet pits, that is, uncracked pits, which belonged

(Testimony of Jack M. Kaplan.)

to him, which he voluntarily offered to give to Mr. Bonzi as a consideration, without charge, [60] in order to finalize this matter—as an encouragement and consideration to finalize it.

He had had so much with it for days and days—he had lost a lot of sleep in the matter, and the office was very confused as a result of all this, and he had offered this consideration, which was quite a valuable lot of merchandise; but he couldn't get anything from him; nothing could be reduced to writing.

By the way, Bonzi had agreed to meet us later at his office, I think it is Mr. Prince, his attorney's name, 11:30 that day.

Q. Have you given us the conversation of what the conversation was? A. With Mr. Sternau.

Q. With Mr. Sternau? A. Right.

Q. Well, thereafter, on the same day, was a meeting held at Mr. Bonzi's, at his attorney's office, and at which Mr. Sternau was present?

A. There was.

Q. And what transpired at that meeting?

A. Well, Bonzi said—Mr. Bonzi volunteered the information and said that he originally had 1,000 tons on hand at the beginning of the season, so he had sold 400 tons of this material—apparently that was the Continental Nut matter I have previously described—and he had 300 tons balance, and [61] four and three makes a total of seven, which was the final tonnage, as against the original estimate of a thousand. This was voluntarily given

(Testimony of Jack M. Kaplan.)

to us by Mr. Bonzi. But he still had these 300 tons on hand and that he would like to make delivery because—I have a note here that “Rains were predicted for tomorrow”; the rainy season was coming; he didn’t want the stuff to sit around exposed to the weather, and he would like to make delivery.

Now, apparently, Mr. Eisner, you had said at that time:

“Assuming we get a reasonable agreement with Calpak to crack out with reference cost, why don’t we settle the matter right here and now?”

And Mr. Prince, attorney for Mr. Bonzi, interrupted and said:

“Well, he was entitled to quote expenses on this matter because Mr. Sternau had promised that a plant would be available to crack this material and it was not available at the date originally promised; it still was not available; that they had suffered storage charges, finance charges, all of which amounted to expenses he believed he was entitled to before any settlement could be made with reference to delivery.”

Then I have here a note that Mr. Eisner said we would sue Sunset-Sternau for damages on a replacement value of about 42 cents current market value for this material and [62] that Sunset-Sternau obviously would have to sue on that matter, too, on that basis of price.

And at this point Mr. Prince said to Bonzi, quote:

(Testimony of Jack M. Kaplan.)

“We talked about a 25 cent market this morning. We will have to change our figures now.”

And basically that was the end of the conversation because Mr. Prince said that he had to try a case at 1:00 o'clock that day and that he would be back at 4:00 o'clock.

Q. Thereafter did you have another meeting in the afternoon, or what transpired?

A. I want to refresh my memory from these notes here for a moment.

Oh, yes. We were back in Mr. Sternau's office after having lunch. We arrived at Mr. Sternau's office about 1:30, approximately, and there we met Mr. Steve—I assume this is Steve Tarrico; is that his name?

We met Steve there, who said when Mr. Sternau was in New York he phoned him the offer of 17 and a half cents and that Bonzi was present in the office and Bonzi had approved the deal, but now he was welching. He said further, “If we can get the cooperation of Bonzi in this matter, how soon would I need delivery?”

I indicated in reply to this that the specific date of delivery wouldn't be too pertinent; we could arrange for delivery which would be satisfactory for our purposes; whether [63] it was sooner or later didn't matter too much; in my opinion, I could get our New York office to accept any reasonable delivery date; that was no matter, really, for discussion.

(Testimony of Jack M. Kaplan.)

Mr. Bonzi then called California Packing Corporation.

Q. Just a moment. Was Mr. Bonzi present at this conversation? A. Yes, he was.

Q. I see. Mr. Bonzi you had not mentioned——

A. He was not present while we were talking to Steve, I wouldn't say then, but he arrived later that afternoon.

Q. At the plant at the Sunset-Sternau?

A. That's correct.

Q. What transpired then?

A. Mr. Bonzi called the California Packing Corporation trying to contact Mr. Glenny in attempting to get a price for the crack out and finalize the delivery of his apricot kernels, or, rather, pits in this case.

He advised us that Mr. Glenny was not present when he called; he was notified that Mr. Glenny would be back at 4:00 p.m., and he indicated that he would discuss the matter the next morning at 10:00 o'clock, and we left.

I have another note here that I notice would be of interest.

When Bonzi left, Mr. Sternau and—I think you were with us, too, Mr. Eisner; yes, you were—you, Mr. Sternau and myself, had then gone to Mr. Sternau's Almondale cracking plant. That is the next thing that happened that afternoon—where [64] Mr. Sternau showed me some equipment that he had had for sale. He offered me a three roll refining machine which he had used to pulverize

(Testimony of Jack M. Kaplan.)

nut meats when he was in the nut paste business, and he had showed that to me among other things, and he asked me if I would be interested to purchase it.

And in brief, we didn't purchase it because of the difficulty in price of water shipment from that point to New York; it wasn't worth while.

That was the remainder of the afternoon. We spent that time looking at the plant.

Q. Was that equipment for use in the making of almond kernel nut paste?

A. I couldn't specifically answer that, but I do know that Mr. Sternau, or Sunset-Sternau, was in the nut paste business. That might be almond paste, macaroon paste, kernel paste. But he was in the nut paste business, and he had discontinued it, he indicated that to me.

Q. After this conversation that you have just related, what next occurred, Mr. Kaplan?

A. As far as I know, that was the end of all discussion with Mr. Sternau that day, and I had returned to New York.

Q. And on November 16, 1955, did you receive any advice from me that I had received word from Mr. O'Connor that delivery would not be made?

A. That's right; you had phoned me and had given me the [65] information which I believe—I believe at this time that you had received a letter and you had read the letter to me or the essence of that letter.

(Testimony of Jack M. Kaplan.)

Q. A letter from the attorneys for Bonzi—Mr. Bonzi? A. Right.

Q. And I told you of the telephone conversation with Mr. O'Connor?

A. With Mr. O'Connor.

Q. That delivery would not be made?

A. That's correct.

Q. That was on November 16, 1955?

A. That's correct.

Q. Was the first time, Mr. Kaplan, that you received notice or information from Sunset-Sternau Food Company directly or indirectly that delivery of the apricot kernels which you had purchased would not be made? A. That is correct.

Q. Mr. Kaplan, on November 16, 1955, what was the market price of regular apricot kernels, f.o.b. dock, San Francisco, of the exact kind and character that you had purchased from Sunset-Sternau Food Company?

A. To the best of my knowledge it was about a 43 cent price at that date.

Mr. O'Connor: May I ask what date that was?

Mr. Eisner: November 16, 1955. [66]

Q. Now, Mr. Kaplan, you stated that you purchased apricot kernels in September, I believe September 23, 1955, when you were here for 28 cents.

A. That's correct.

Q. Did the market go up after that time?

A. It had been going up steadily from that point at a definite trend of higher and higher and higher daily.

(Testimony of Jack M. Kaplan.)

Q. Now, did you personally—I mean American Almond Products Company—purchase regular apricot kernels f.o.b. dock, San Francisco in the month of November, 1955? A. I did.

Q. What date in November, 1955, did you purchase regular apricot kernels?

A. On November 7th, 1955, we purchased 60,000 pounds of regular apricot kernels.

Q. At what price?

A. 40 cents per pound.

Q. 40 cents per pound? You have the contract there at that price? A. Right.

Mr. Eisner: We offer this contract in evidence as plaintiff's exhibit next in order.

Mr. O'Connor: Are these related documents?

Mr. Eisner: Yes.

Q. The blue copy is really the contract, isn't it?

A. That's correct.

Mr. Eisner: Just so there won't be any superfluous documents, I will just introduce the contract itself.

The Court: Let it be admitted and marked.

The Clerk: Plaintiff's Exhibit 42 admitted and filed in evidence.

(Contract referred to was marked Plaintiff's Exhibit No. 42 in evidence.)

Mr. Eisner: This is a contract from California Packing Corporation for 60,000 pounds of regular apricot kernels at 40 cents per pound, not exceeding five per cent by weight broken.

Q. Mr. Kaplan, if you had been advised at a

(Testimony of Jack M. Kaplan.)

prior date, say September 23, 1955, that Sunset-Sternau Food Company would not deliver the apricot kernels, would you have covered your requirements and this contract at a lower price?

A. Most definitely.

Mr. O'Connor: Just a minute. If the Court please, I will object to the question as calling for the opinion and conclusion of the witness on the matter of damages; it tends to be involved in speculation of the witness as to what he would or would not have done at a prior date had certain facts been made known to him.

Mr. Eisner: The purpose of this question, if the Court please, is not proof of market value, but the proof is for this [68] purpose: The defendant has pleaded the statute of frauds, if the Court please, here, and in addition to other principles which prevent them from relying on that, there is the principle of estoppel; and the law is quite definite that if a seller who has entered into, let us say a contract within the statute of frauds, promises delivery, and in reliance upon such promises, the buyer does not avail himself of the ability to cover at a lower price and the price thereafter advances to his detriment, that the seller is estopped from relying upon the statute of frauds for the reason that the buyer, by reason of the conduct of the seller, has relied upon such conduct and acted to his detriment, and consequently the seller is estopped to rely upon that.

I have authority to that effect, and that is the

(Testimony of Jack M. Kaplan.)

purpose of this question, if the Court please, and it is not for the purpose of establishing market value.

Mr. O'Connor: If the Court please, in connection with the question of estoppel, we have a situation which has just delivered by the last exhibit. We find the date November 7, 1955, was the date that a contract was entered into with Calpak for 60,000 pounds of these kernels.

By testimony adduced prior to that, it was determined that they had never received absolute word, according to their own statement, taking their evidence at its face value——

Mr. Eisner: Until November 16. [69]

Mr. O'Connor: Until November 16. They now go back to a prior date in order to establish an estoppel. The estoppel will depend, if the Court please, not only upon conduct of the buyer,—of the seller—but also conduct of the buyer and his right to rely upon the conduct of the seller, the right in this case to be determined from all of the facts. And one of those facts will be the fact as to whether or not he had a right at that time to say there was or was not a contract.

The question as to whether or not he was relying solely upon Sunset-Sternau for this particular contract, or whether his conduct was influenced by other factors—it is certainly calling for speculation at this time and not any proof of any estoppel, to ask him a question which will call for a self-serv-

(Testimony of Jack M. Kaplan.)

ing answer as to what he would have done in September of 1955.

The Court: The Court is prepared to rule.

Mr. O'Connor: Very well.

The Court: The objection will be overruled. It goes in evidence subject to a motion to strike.

Mr. O'Connor: Subject to a motion to strike, your Honor.

Mr. Eisner: Would you kindly read the question to the witness? Do you have the question in mind?

A. I have not.

Mr. Eisner: We will have the reporter read it.

(The reporter read the question.)

A. Most definitely.

Mr. Eisner: I think that is all.

The Court: We will take a recess.

(Recess.)

Cross Examination

Q. (By Mr. O'Connor): Now, Mr. Kaplan, I believe you have told us upon your direct examination that you have been in the paste business for many years; that is, making paste out of these apricot kernels, and you have described the process to us.

Mr. Eisner: You had better answer out loud so the reporter can hear you and get it.

Q. (By Mr. O'Connor): Is that correct?

A. That's correct.

Q. And for how many years have you been so engaged?

A. Personally, or the firm?

(Testimony of Jack M. Kaplan.)

Q. Personally. A. You mean myself?

Q. Yes. A. Ten years, approximately.

Q. Ten years. That would put it about 1947?

A. That's correct.

Q. And during the time that you were in the business, did you ever buy from Sunset-Sternau any apricot kernels? [71]

A. You mean prior to this contract?

Q. Prior to this deal.

A. Not to my knowledge, no, sir.

Q. Not to your knowledge.

You do the buying—you supervise the buying for your firm, do you not? A. That is correct.

Q. And all the contracts pass through your hands? A. That is correct.

Q. And you are the secretary of the corporation, are you? A. That is correct.

Q. And I take it, general manager, also?

A. Well, it is a question of definition of general manager.

Q. Well, you generally supervise the business, I presume?

A. Some parts of it. I have nothing to do with production except in an indirect manner. We have a production manager who is directly involved with production.

Q. You supervise the buying and selling of the products generally speaking?

A. That is correct.

Q. Is the making of that paste that you have

(Testimony of Jack M. Kaplan.)

described the sole business of the American Almond Company?

A. We have other products, if that is the answer you are looking for. We sell paste, nut paste, one of which is the kernel paste, and we sell many other products, as well. [72]

Q. Yes, and your kernel paste is just one of the many products that you sell?

A. That is correct.

Q. By the way, you likewise buy and sell through Prince-Keeler and Company of New York, do you not?

A. We sell a very limited amount of goods through Prince-Keeler. He has one account in Puerto Rico and one account—that is in Puerto Rico, and one account in New England. Basically, to my knowledge, there may be one other, but in total these two or three accounts through whom we sell merchandise—that is, through Prince-Keeler—are very negligible. If you want an estimate of the total sales per month or per annum, I could tell you it is a very insignificant factor, but the answer is yes.

Q. Mr. Astrack from that office generally—at least about the time of this deal in 1955—serviced your account, didn't he?

A. That is correct.

Q. And it was through Mr. Astrack that you met Mr. Sternau in July of 1955?

A. I had met Mr. Sternau prior to that date. It was not through Mr. Astrack that I had met Mr. Sternau.

(Testimony of Jack M. Kaplan.)

Q. You had done business with Sunset-Sternau Company before that time?

A. That is correct. [73]

Q. And you did business, as a matter of fact, during this period of time in 1955, did you not?

A. That is correct.

Q. And on the occasion of your meeting in 1955, Mr. Kaplan, concerning the discussion of the sale of apricot kernels in question, it came out at that conference, did it not, that this was the first time that Sunset was engaged in that particular field or line of activity?

A. It was the first time that I had been offered apricot kernels by Sunset-Sternau Company. I could not say that I had knowledge or did not have knowledge, either way, that there might or might not have been other negotiations with kernels prior to that date, but I certainly had not knowledge of it directly. This was the first time I had been offered kernels from Sunset-Sternau.

Q. Well, wasn't it discussed with you at that conference that Sunset-Sternau was new in the business of selling apricot kernels?

A. If there was such discussion at all it was of insignificant duration of time or material significance—had no material significance. I have no definite recollection of any serious discussion about it.

Q. Well, weren't you advised by Prince-Keeler that this was the first time that Sunset was selling apricot kernels?

(Testimony of Jack M. Kaplan.)

A. To me definitely, and whether there was any discussion [74] about other parties, I have no recollection; but I know distinctly to me, as far as I was concerned, that Prince-Keeler had indicated that it was the first transaction on kernels that they had ever handled, and they were rather unfamiliar with the normal confirmations of such sales, the normal terms, and we had discussed—prior to any written sold or bought note, we had discussed in a superficial way some of the terms of the sale as they appear in such confirmations.

Q. When did you discuss the terms of sale, at that original conference?

A. Oh, no. That was discussed, as I recall, either on September 1st, the date of the confirmation, or possibly the day prior to September 1st.

Q. And at that time, of course you knew that Sunset was new in the business?

A. As far as I was concerned, yes.

Q. And you were advising them of the contract that you wanted?

A. I was advising Prince-Keeler, who was confirming in writing. I had direct knowledge from Prince-Keeler that they had never transacted business in this material; I had no specific knowledge that Sternau or Sunset-Sternau may or may not have dealt in this article prior to that date.

Q. I will show you a letter from Prince-Keeler directed to [75] Sunset-Sternau, which is Plaintiff's Exhibit No. 7 in evidence, and ask you if this

(Testimony of Jack M. Kaplan.)

letter signed by Mr. Berke, contains a true statement of your knowledge at that time.

A. What is the date of that letter?

Q. The date of the letter is September 1, 1955, and the letter reads as follows:

“Confirming today’s phone conversation with you”——

and this is addressed to Mr. Steve Tarrico, Sunset-Sternau Food Company, Modesto, California,

“Dear Steve:

“Confirming today’s conversation with you, we immediately contacted the buyer, Mr. Kaplan, of American Almond. He felt that, due to the fact that you fellows were new in the business, he should get a slightly lower price than the current market. However, he went along with us paying your price, 17½ cents. In fact, he was most cooperative.”

Would you say that you made that statement to Mr. Berke, or was Mr. Berke incorrect in his statement in this letter?

A. I would say basically it is a correct statement.

Q. Now, you received from Prince-Keeler under the same date their bought note which is Plaintiff’s Exhibit No. 8, and which has been introduced in evidence in this case, relative to approximately 75 tons of regular apricot kernels at [76] 17½ cents per pound, did you not?

A. That is correct.

Q. Do you have a copy of that with you, sir?

(Testimony of Jack M. Kaplan.)

A. I do. I have a photostat of it.

Mr. Eisner: By the way, I don't believe the bought note is an exhibit.

Mr. O'Connor: Well, the sold note is; sold or bought, it is the same identical instrument, except that certain carbons contain "Sold" and other carbons contain "Bought."

Mr. Eisner: That's right; both have been introduced into evidence.

Mr. O'Connor: That is correct. The only difference is in the printing.

The Witness: And the signature.

Q. (By Mr. O'Connor): What signature are you referring to, sir?

A. My recollection—I have a photostat of the sold note copy. I originally received the bought note copy. As I recall it, the bought note which I had received, was signed by Mr. Konenbank marked "Thanks"; and I see the sold note——

Q. Who was Mr. Konenbank?

A. I never met the gentleman, but I was told by Mr. Berke that he was at the time a clerk handling these confirmations in Prince-Keeler's office.

Q. He wasn't associated with American Almond? A. No, sir. [77]

Q. By the way, are you a member of the Associated Food Distributors, Inc., of New York City?

A. I am.

Q. Where?

A. I should say the firm is.

Q. The firm is? A. Right.

(Testimony of Jack M. Kaplan.)

Q. You will likewise notice in the lower portion of the contract in large type appear the words "Subject to confirmation of seller"; that is correct, is it not? A. Correct.

Q. You knew at the time you received this note that Sunset-Sternau operated upon only written contracts signed by the buyer and seller, did you not?

Mr. Eisner: That is objected to, if the Court please, as not proper cross-examination, irrelevant and immaterial, what their practice was and how they operated. The question resolves itself down to a question of law as to the effect of these bought and sold notes, together with the recognitions and ratifications subsequent thereto.

Mr. O'Connor: If the Court please, the question is directed at the witness for the purpose of establishing the fact that it was within the contemplation of the parties that a written contract would be entered into. They are pleading custom and usage here as affecting this sale. Our answer [78] contains a denial of any contract. And certain this is proper cross-examination from that standpoint, going into the very contract or the very right or document which these people rely upon.

The Court: The objection will be overruled subject to a motion to strike. Overrule the objection.

Mr. O'Connor: Would you read the question back, Mr. Reporter?

(The reporter read the question.)

(Testimony of Jack M. Kaplan.)

A. I had no reason to believe that that was a consistent mandatory policy for several reasons, on the part of Sunset-Sternau Company.

The Court: What reasons do you have in mind?

A. Number one: To the best of my recollection I had received similar bought and sold—or in my case I would receive bought note copies. To the best of my recollection Prince-Keeler had confirmed several purchases I had made from Sternau—Sunset-Sternau Company—using different forms of such confirmation. That is point one.

Point two is that I—as a buyer, American Almond had made many purchases of apricot kernels from other sellers in California where this broker's confirmation was the sole written evidence of a contract without any subsequent confirmation of a more formal contract.

It was very, very normal for me to assume a great possibility that this would be the final written confirmation, [79] because on its face it reads, among other things, on the top, number one:

“If incorrect, advise immediately.”

Number two, on the bottom—if I can find it here in a moment—under the clause of arbitration on this very document:

“Any controversy or claim arising out of or relating to this contract shall be arbitrated before the Association of Food Distributors, Incorporated, New York City. This memorandum shall be subordinate to a more formal contract if and when such contract is executed. In the absence of such

(Testimony of Jack M. Kaplan.)

contract, this memo represents the contract of the parties; seller guarantees to conform to National Pure Food Laws.”

And, as I said previously, I had many purchases of apricot kernels from California where such a broker’s memorandum was the sole written confirmation.

Mr. O’Connor: I will move to strike out the answer as not responsive to the question. The question, if the Court pleases, was directed to him, if he didn’t know as a matter of fact that Sunset-Sternau depended upon a formal written contract as evidencing the agreement of the parties.

Mr. Eisner: I think he has——

Mr. O’Connor: Just a minute, counsel. [80]

Mr. Eisner: Very well.

Mr. O’Connor: He has diverted that to include the world at large and his dealings with other firms, without naming them, that he might have done business with. This question is solely directed to this controversy, to these people, to their method of doing business between them.

Mr. Eisner: If the Court please, he has answered the question and has explained his answer. As a matter of fact, he has stated “for several reasons.” The Court asked him, “What were the several reasons?” and he has given the explanation as to why he didn’t know and didn’t believe that the broker’s memorandum was not the final arrangement or what the practice of Sunset-Sternau was.

(Testimony of Jack M. Kaplan.)

He is certainly entitled to give his answer and explain his answer.

The Court: The objection will be overruled. Let the record stand.

Q. (By Mr. O'Connor): Well, as a matter of fact, Mr. Kaplan, in 1954 you entered into an agreement with Sunset-Sternau which was evidenced by a written contract under the caption "Sunset-Sternau Food Company Sales Contract."

I think you have already seen this, counsel. This is the one I showed you.

The Witness: 1954?

Mr. O'Connor: Yes.

Mr. Eisner: This is a contract for almonds, counsel. [81]

Mr. O'Connor: That is correct; it is a contract for almonds.

Q. Is that your signature on that document, Mr. Kaplan? A. It is. That's correct.

Q. That was a contract that was submitted to the American Almond Company by Sunset-Sternau Food Company?

A. That is correct. I am wondering what the sales memorandum——

Q. If you will note, Mr. Kaplan, under the heading "Broker" appears the name "Prince-Keeler and Company, Inc." and their sales order, does it not, on the lower right-hand side of the upper portion? A. It does.

Q. So that the purchase that you made at that time from Sunset was through PrinceKeeler and

(Testimony of Jack M. Kaplan.)

Company, was it not? A. That is correct.

Q. And it was confirmed by this written contract; isn't that correct?

A. That is correct.

Mr. O'Connor: If the Court pleases, I will—that this go into evidence as Defendants' Exhibit first in order.

The Court: Let it be admitted and marked.

The Clerk: Defendants' Exhibit B admitted and filed in evidence.

(The contract referred to was marked Defendants' Exhibit B in evidence.) [82]

Q. (By Mr. O'Connor): Now, this is another document. As a matter of fact, during the period of time that this contract for apricot kernels was under consideration between American Almond, Prince-Keeler and Company and Sunset-Sternau, you entered into another contract for the purchase from Sunset through Prince-Keeler and Company of shelled almonds? A. That is correct.

Q. I will show you a contract, No. 2206, and the heading "Sunset-Sternau Food Company Sales Contract," dated October 18, 1955, buyer, American Almond Products Company, and signed by yourself; that is correct, is it not?

A. That is correct.

Q. That is your signature?

A. It is my signature.

Mr. O'Connor: If the Court please, I will ask that this be marked as Defendants' exhibit.

The Court: Let it be marked in order.

(Testimony of Jack M. Kaplan.)

The Clerk: Defendants' Exhibit C admitted and filed in evidence.

(The contract referred to was marked Defendants' Exhibit C in evidence.)

Q. (By Mr. O'Connor): Mr. Kaplan, following the delivery to you of the bought note which has been referred to here as Plaintiff's Exhibit No. 8, you were informed by Prince-Keeler and Company, Mr. Frank Sullivan of that firm, that Sunset-Sternau Company had sent their formal contract on to New York [83] for signature by American Almond Company, were you not?

A. What was the date you are referring to? September 8, is that correct?

Q. I am referring to the fact that following—I will restate my question.

Following your receipt of Plaintiff's Exhibit 8, the bought note——

The Witness: Can I have some reference to what that exhibit is?

Q. (By Mr. O'Connor): Exhibit 8 is the bought note. A. I see. Yes.

Q. You were informed some days following your receipt of that bought note dated September 1st, 1955, that Sunset-Sternau had sent its formal contract on to Prince-Keeler to be forwarded to you for signature, were you not?

A. That is correct.

Q. You were likewise informed by Mr. Frank Sullivan of the firm of Prince-Keeler and Com-

(Testimony of Jack M. Kaplan.)

pany, that he was going to mail that contract to you, were you not? A. Yes.

Q. And you advised him that the contract should contain a clause which reads as follows:

“Merchandise not to exceed five per cent by weight broken kernels.”

Isn't that correct? [84]

A. Not the way you word it. You said “should contain a clause.” I advised Mr. Sullivan that many such contracts do contain such a clause; that it was normally understood in the trade as an implied thing, and in some cases they were in the contract—this clause was in the contract, and in some cases this clause was not in the contract; but in view of the fact that this was an initial delivery, I would prefer that it be clearly stipulated in the contract, and I requested that it be returned to the maker for such stipulation.

Q. As a matter of fact, Mr. Kaplan, it is usual in your business, in the business of buying kernels, that that clause be in the contract; isn't that a fact?

A. It is not a fact.

Q. Let me show you Plaintiff's Exhibit No. 42, which is apparently a contract; it is a bought note or—yes, it has been signed—wherein American Almond Products Company under date of 11/7/55, November 7, 1955, bought from the California Packing Corporation, New York, 60,000 pounds of apricot kernels at 40 cents a pound.

I will ask you to examine that contract and state

(Testimony of Jack M. Kaplan.)

whether or not the clause "five per cent by weight broken kernels" isn't in that contract.

A. It is in the contract, and it always appears in Calpak's contracts.

Mr. O'Connor: Mr. Eisner, I think you have the two [85] contracts which you showed me earlier in the month of August, 1955, with Calpak, and with Rosenberg Bros.—I believe those were the two firms—which have not been introduced in evidence. May I see those documents, please?

Mr. Eisner: I have no recollection, but if the witness has them, I have no objection.

Mr. O'Connor: I was shown the documents at the outset of the trial.

The Witness: What are the dates, counsel?

Mr. O'Connor: In the month of August, 1955. I was shown by Mr. Eisner two contracts which have not been introduced in evidence.

The Witness: I may have them on the desk.

Mr. O'Connor: May I have a ruling of the Court that they be produced?

The Witness: August, 1955?

Mr. O'Connor: That is correct.

The Witness: I have one here of September, 1955. Is that the one that we were discussing previously?

Mr. O'Connor: That has been referred to in evidence, but there were two documents which were shown to me at the outset of the trial dated in the month of August where the sales were for 17½ cents.

(Testimony of Jack M. Kaplan.)

Mr. Eisner: We have introduced those two contracts at 17½ cents, counsel. Maybe they are in evidence if you [86] will look.

Mr. O'Connor: I am sorry, your Honor; they are in evidence. My memory over the weekend must have failed.

The Witness: California Packing?

Mr. O'Connor: Yes.

Q. I will show you these two contracts which are entitled Plaintiff's Exhibit No. 37. Referring to the contract of August 26, 1955, buyer American Almond Products, seller, California Packing Corporation, New York, for 140,000 pounds apricot kernels at 17½ cents a pound, and ask you to examine that contract and tell us whether or not the clause "five per cent by weight broken kernels" isn't in that contract?

Mr. Eisner: Of course, the contract speaks for itself, and the witness stated in all California Packing Corporation contracts that appears, but not in others.

Mr. O'Connor: Very well; let's have the answer "Yes."

Q. The clause appears there, does it not?

A. It does; it says "not exceeding five per cent by weight broken."

Q. Yes. Now we have, I believe it is another contract attached to this—yes—and it is part of the same exhibit, a contract dated August 31, 1955, the same firms involved, for 70,000 pounds apricot kernels at 17½ cents per pound, and ask you if the

(Testimony of Jack M. Kaplan.)

clause "not exceeding five per cent by [87] weight broken" does not appear in that contract?

A. It does appear in the contract.

Mr. O'Connor: May I see the contract submitted, the 28-cents a pound purchase, counsel?

The Witness: Right here.

Q. (By Mr. O'Connor): What firm is that, please? A. That is Rosenberg Bros.

Q. Let me ask you this, Mr. Kaplan: Did you not instruct Prince-Keeler and Company to return Sunset's formal contract for insertion of the five per cent clause? A. I did so instruct them.

Q. And you also instructed them, did you not, that the five per cent clause should be included in the so-called bought note of September 1st; isn't that correct? A. That is not correct.

Q. Well, let me allow you to read this Plaintiff's Exhibit No. 10, which is in evidence, and ask if the statements by Mr. Frank Sullivan are not correct—are correct or incorrect.

A. Well, I will read it out loud.

(Reads) Dated September 8th, Frank Sullivan, addressed to Sunset-Sternau Company.

"Gentlemen: Mr. Kaplan of American Almond Products Company, Incorporated, phoned today that two 100-pound bags of apricot kernels were received and found satisfactory with one exception: the [88] broken kernels far exceeded the normal tolerance.

"We advised him that we were mailing your formal contract No. 2023, received today. However,

(Testimony of Jack M. Kaplan.)

during the discussion he advised that he had overlooked the following standard clause, quote: 'Merchandise not to exceed five per cent by weight of broken kernels,' unquote, and requested that we add this on our contracts and return yours for the same advised that all his regular suppliers'"——do you want me to go further or is that far enough for your purpose?

Q. That's far enough for present purposes.

A. Right.

Q. So you did advise Prince-Keeler then to add that clause on to the so-called bought note of September 1st, did you not? A. I did not.

Mr. Eisner: That isn't true at all, counsel; that is a misstatement. You had better read the rest of the letter, Mr. Kaplan so that——

The Witness: I have a copy of it which was sent——

Mr. Eisner: Read the rest of it.

The Witness: I have a copy of it which was sent to me by Mr. Sullivan. You have a photostat; I have a copy.

(Reads) ——“‘Merchandise not to exceed five per cent by weight of broken kernels,' unquote, and requested [89] that we add this on our contracts and return yours for the same addition. He advised that all his regular suppliers, that is, Calpak and Rosenberg, insert this clause, which is a recognized condition of sale for this particular item. It was not brought up before because he assumed it would be included as a matter of course in your contract. We

(Testimony of Jack M. Kaplan.)

are, therefore, returning your contract No. 2023 as enclosure and will appreciate your authorizing the addition of the above clause in compliance with the buyer's request.

“Awaiting your further advice in this matter.

“Yours very truly, Prince-Keeler and Company,
Frank Sullivan.”

The Court: What is the date of that letter?

The Witness: September the 8th, your Honor.

Q. (By Mr. O'Connor): Mr. Kaplan, is that a fair statement of the conversation between you and Mr. Sullivan—the entire letter.?

A. In some particulars it is not correct, but generally speaking it indicates the conversation.

Mr. Eisner: Can you point out where it is incorrect?

Mr. O'Connor: Just a minute, if the Court please. You will have your turn, I presume, counsel, in rebuttal.

Mr. Eisner: All right. [90]

Mr. O'Connor: Or on redirect examination. Excuse me.

Q. Now, Mr. Kaplan, was the bought note dated September 1st, 1955 issued by Prince-Keeler and Company ever amended to include the five per cent clause? A. No, sir.

Q. Did you ever thereafter demand of Prince-Keeler and Company that they insert that clause in that contract?

A. No, sir. You mean in the bought note?

(Testimony of Jack M. Kaplan.)

Mr. Eisner: Are you referring now to the bought note or are you referring to the——

Mr. O'Connor: I am referring to the bought note, counsel.

Mr. Eisner: Well, now, if you will just——

Mr. O'Connor: You make your objection.

Mr. Eisner: Let me understand the question so that it is clear, so that the witness understands it.

Mr. O'Connor: As I understand it, the Court is here to supervise the two of us and if you have any objections to my questions, I am certain the Court would be willing and quite anxious to pass upon them. I will submit the matter.

Mr. Eisner: So shall I. Certainly when you refer to a document, I certainly have the right to enquire what you are referring to.

Now you are stating you are referring to the bought note and not to the more formal contract which was signed. If you will let the witness understand the question, I have no [91] objection to his answering.

The Court: Proceed.

Q. (By Mr. O'Connor): Now that we have determined that, Mr.—Mr. Kaplan, you understand, do you not, by the contract which you claim to be in writing in this case, is the bought note of September 1st, 1955, do you not?

Mr. Eisner: Just a minute.

Mr. O'Connor: Now just a minute. If the Court please, counsel was——

The Court: Give him an opportunity to object.

(Testimony of Jack M. Kaplan.)

Mr. Eisner: The understanding of what the contract is is a question of law and I think that it is an improper question, calling for the conclusion of the witness as regarding what document constitutes the contract; it is calling for the conclusion and opinion of the witness on a matter which is a question of law.

Mr. O'Connor: There is a pleading in here, if the Court please, and I am trying to determine for the first time where the contract is in this case from this witness, and I have asked him the specific question on cross examination, may it please the Court, if the bought note of September 1st, 1955, is the contract upon which he is relying. He is the plaintiff.

The Court: Isn't that calling for the opinion and conclusion of this witness as a matter of law?

Mr. O'Connor: No, it is not, because they have pleaded a [92] written contract in their complaint, and I am trying to find out where is the contract—where is the written contract.

The Court: I will allow the question subject to a motion to strike in the interests of time. You may answer the question.

The Witness: Would you re-word the question, please?

Mr. O'Connor: I won't re-word it; I will ask the reporter to read it again.

The Witness: Re-read it. I don't remember the question.

(The reporter read the last question.)

(Testimony of Jack M. Kaplan.)

A. It is my understanding that this is the contract, because I never have seen a more formal contract executed, and it is my understanding, in the absence of a more formal contract, that this is the contract.

Q. (By Mr. O'Connor): Mr. Kaplan, did you ever sign or did any other officer of American Almond Company ever sign any writing with Sunset-Sternau Food Company for the purchase from Sunset of 75 tons of apricot kernels in the year 1955?

A. I have signed some writings, yes. There are letters. If you refer to the word "writings," we have a great deal of correspondence between the parties here, all of which are writings referring to such a transaction, and we have signed many such writings—at least I have.

Q. Did you or any other officer of American Almond Company during the year 1955 sign a formal contract of any kind or [93] description with the Sunset-Sternau Food Company for purchase of 75 tons of apricot kernels? A. No, sir.

Q. All right. Did you or any officer of American Almond Company, on or about September 8, 1955, enter into a written contract and execute it on behalf of American Almond Company for the purchase from Sunset-Sternau Company of 75 tons of apricot kernels?

A. Would you read that question again?

The Court: I suggest you reframe the question in the interest of time.

Q. (By Mr. O'Connor): Did you, Mr. Kaplan,

(Testimony of Jack M. Kaplan.)

or any other officer of the American Almond Company, on September 8, 1955, sign an agreement in writing to purchase from Sunset-Sternau Food Company 75 tons of apricot kernels?

A. No, sir.

Mr. O'Connor: I notice it is 12:00 o'clock. Does your Honor want to recess?

The Court: Very well. We will take a recess until 2:00 o'clock.

(Thereupon a recess was taken until 2:00 o'clock p.m.) [94]

Monday, February 25, 1957—Afternoon Session

JACK M. KAPLAN

called as a witness by Plaintiff, resumed the witness stand, and testified further as follows:

Cross Examination—(Continued)

Mr. O'Connor: May I have the last question and answer read?

(The reporter read the record.)

Q. (By Mr. O'Connor): Now, Mr. Kaplan, at any time from July, when you first saw Mr. Sternau at your plant, until November 16, when your attorney was informed by me that there would be no delivery, did you waive, so far as this particular order was concerned, the qualification that the weight by broken kernels would not exceed five per cent?

A. I would have to answer your question in this manner:

I wouldn't say that I waived it. We discussed it.

(Testimony of Jack M. Kaplan.)

As to whether it became a condition of being waived or not, I wouldn't know; I would let you people decide. We did discuss it. There was an occasion—I think it was during the month of September—when I spoke to Mr. Sternau on the phone. That was the occasion when he indicated that he had difficulty with the cracking. Mr. Sternau, as I recall it, said that because of the fire at Los Gatos at the Sewell-Brown plant, he was having difficulty getting a crack out. [95]

I at that time said to him I felt quite certain that I could arrange for a crack out, and he replied, well, that would be good; but I think it was something like this where he indicated, "If we find difficulty in getting the crack out, would you"—no, I think it was something like this:

He said that "The probability was that I would still have difficulty getting them cracked, unless you would forget about the five per cent minimum broken," and my reply was that I don't think we would ever get involved with such a thing, because "I am quite sure that if Calpak or Rosenberg were to crack them out, then there would be no problem; but in the event we had difficulty getting either of these two well established firms, with a long history in this product"—if we had difficulty and then he had to resort to some other method of cracking, then in that case, I would be very tolerant with the five per cent.

Now, if that is waiving it, that it as I recall it.

Mr. O'Connor: I move to strike the answer as

(Testimony of Jack M. Kaplan.)

non-responsive to the question. The question was: Did the plaintiff in this action ever, in writing, between the period July, 1955, and November 16, waive in writing the requirements that the kernels be not to exceed five per cent by weight of broken kernels?

Mr. Eisner: I take issue with counsel. I am quite confident in listening to the question, he didn't specify waiving [96] in writing. He asked the witness if he waived at any time that condition, and the witness has answered the question by factually telling what occurred, and I think his answer is thoroughly responsive.

The Court: Let the question and answer stand. The objection will be overruled.

Q. (By Mr. O'Connor): Mr. Kaplan, so there won't be any question, did you between the period July of 1955, when you first met Mr. Sternau, and November 16 of 1955—you or anybody on behalf of American Almond Company—waive the requirement that the kernels be not in excess of five per cent broken kernels—not be in excess of five per cent by weight?

Mr. Eisner: Just a moment. That question has been already asked and answered as far as—

The Court: In the interests of time he may answer. The objection may be overruled.

A. In the sense that I have just answered, if you call that telephone conversation waiving it under these conditions, then under those conditions I waived it.

(Testimony of Jack M. Kaplan.)

Mr. O'Connor: I move to strike the answer, if the Court pleases, as not responsive to the question.

The Court: Let the question and answer stand. Proceed.

Q. (By Mr. O'Connor): Mr. Kaplan, how many orders or what was the total volume of orders you had with Sewell Brown and [97] Company at the time of their fire?

Mr. Eisner: That is objected to as irrelevant, and immaterial.

Mr. O'Connor: It has a definite bearing on this case, if the Court please, as to whether there was any financial or pecuniary loss suffered by the plaintiff.

The Court: I didn't hear the question. Reframe your question, please.

Q. (By Mr. O'Connor): Mr. Kaplan, what was the total volume of orders for apricot kernels that you had on order with Sewell Brown and Company of Los Gatos at the time of their fire?

Mr. Eisner: That is objected to as irrelevant, incompetent and immaterial and not proper cross examination.

The Court: Indicate for the purpose of the record the purpose of that question.

Mr. O'Connor: The purpose, if the Court please, is to determine whether or not, by reason of any failure, if there was a failure of delivery here, whether there was any pecuniary or financial loss involved in connection with the plaintiff's business. The element of how many orders he had of apricot

(Testimony of Jack M. Kaplan.)

kernels with Sewell Brown and Company might be partially determinative of that fact.

Mr. Eisner: May I answer counsel and say this, if the Court pleases: The measure of damages for failure to deliver [98] personal property under contract of sale is well established as being the difference between the contract price and the market value or price of the commodity at the time that delivery is required to be made under the contract.

And so far as this case is concerned, as I have heretofore stated, I believe, the time of delivery having been by promises extended until November 16, 1955, and then the refusal having been given, the measure of damages is of that date.

So whether or not—I would say this: It isn't competent to go any further into business transactions unless we had pleaded special damages, loss of profits, and so forth, which might have, under certain circumstances, be allowable; but in this case we are simply pleading the regular statutory legal measure of damages, which is the difference between the market price and the contract price at the time required for delivery.

That is a matter of law.

Mr. O'Connor: If the Court pleases, I am very happy to hear counsel's statement that he is relying upon the statutory law.

The statutory law in this case revolves around Section 3300 of the Civil Code of the State of California, and the statute is explicit. It reads as follows:

(Testimony of Jack M. Kaplan.)

“For the breach of an obligation arising from [99] contract, the measure of damages, except where otherwise expressly provided by this Code, is the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, or which, in the ordinary course of things, would be likely to result therefrom.” .

And that has been determined by decisions which I can supply to your Honor, and I will do so in the course of the discussion of this case.

The pecuniary loss, in other words, if we have a situation where there was non-delivery, and we have the party obtaining the same merchandise from another party and making the same amount of profit, there has been no loss.

The Court: I can't reason out what the fire in Los Gatos had to do, what causal connection that would have with the issues in this case.

Mr. O'Connor: Yes, it would.

The Court: In what respect?

Mr. O'Connor: Well, in this respect: As to the effect it had upon the market price of apricot kernels. Let me, for the moment, so that I don't—

The Court: The price is the market price, isn't it?

Mr. O'Connor: Pardon?

The Court: The price is the price quoted at that time, whatever the price was? [100]

Mr. O'Connor: There are variable factors there, too, your Honor. There are variable factors, as I understand it.

(Testimony of Jack M. Kaplan.)

For example, if I were to buy high, say two times over the market, and then for my finished product charged a greater amount for it, obviously I wouldn't suffer too much of a financial loss because of the advancement in price.

The Court: That problem isn't before me.

Mr. O'Connor: It may very well be before your Honor in this case.

The Court: With your assurance that it will, I will allow the question, subject to a motion to strike and overrule the objection.

Mr. Eisner: I just want to say first that I must answer counsel that he has the wrong section of the Code which he is relying on for the measure of damage. That is the general clause for ordinary contracts.

Section 1787 of the Civil Code is specifically upon sales measure of damage, and it reads as follows—and I am reading where it is quoted in 116 Cal. App. (2), 485, 596 in *House Grain Co. versus Finerman & Sons*.

“Section 1787 of the Civil Code provides: (1) where the property and the goods has not passed to the buyer and the seller wrongfully neglects or refuses to deliver the goods, the buyer may maintain an action against the seller [101] for damages for non-delivery.

“(2) The measure of damages is the loss directly and naturally resulting in the ordinary course of events from the seller's breach of contract.

“(3) Where there is an available market for the

(Testimony of Jack M. Kaplan.)

goods in question, the measure of damages in the absence of special circumstances showing proximate damages of a greater amount, is the difference between the contract price and the market or current price of the goods at the time or times when they ought to have been delivered, or if no time was fixed, then at the time of refusal to deliver.”

The Court: Let us proceed.

Mr. O'Connor: The question will be answered, your Honor?

The Court: Subject to counsel's motion to strike.

The Witness: Can I have the question re-read, please?

The Court: I will ask counsel to reframe the question.

The Witness: I forget it now.

Q. (By Mr. O'Connor): How much by volume did you have on order from Sewell Brown at the time of their fire, and we have established that as September 20, 1955.

A. I had a total of 280,000 pounds of regular apricot kernels on order with Sewell Brown. There were in addition [102] steamed apricot kernels—do you want that figure, as well?

Q. Yes.

A. Steamed was 105,000 pounds.

Q. Thank you. Now——

Mr. Eisner: May I interrupt counsel? Mr. Engell has come in. Would you mind if we interrupt the cross examination?

Mr. O'Connor: No, not at all.

Mr. Eisner: And place Mr. Engell on the stand, with your Honor's consent.

RAYMOND L. ENGELL

called as a witness for Plaintiff, being first duly sworn, testified as follows:

The Court: Your full name?

A. Raymond L. Engell.

The Court: Spell that last name?

A. E-n-g-e-l-l.

The Court: Where do you live, Mr. Engell?

A. Alameda.

The Court: Your business or occupation?

A. I am assistant manager dried fruit operations with the California Packing Corporation.

The Court: Take the witness.

Direct Examination

Q. (By Mr. Eisner): What particular branch of the operations of the California Packing Corporation are you in charge of, [103] Mr. Engell?

A. I am assistant manager of the dried fruit operation—of the dried fruit division.

Q. Are you in charge of production?

A. I have charge of production from the standpoint of fruit packing as well as fruit purchases.

Q. How long have you been in the employ of the California Packing Corporation?

A. I have been in the employ approximately 28 years.

Q. Is the California Packing Corporation engaged in the sale of apricot kernels?

(Testimony of Raymond L. Engell.)

A. Yes, sir.

Q. How long, to your knowledge, has it been engaged in the production and sale of apricot kernels?

A. I can answer this way: that prior to my employment with the corporation, they were engaged; how long beyond that time, I don't know.

Q. Has it been so engaged during the entire period in which you have been associated with the company? A. They have been.

Q. Is California Packing Corporation, would you say, one of the large producers of apricot kernels?

A. I would consider it in that category.

Q. Are there different classifications of apricot kernels?

A. In the industry we know apricot kernels as regular [104] apricot kernels and steamed apricot kernels, and any other type of kernel that will not make that classification are described as kernels and generally sold on sample.

Q. Is there a kernel also known as sulphured apricot kernels?

A. That is correct; I am sorry, but it is very insignificant in tonnage.

Q. I think the Court was rather interested; it has been brought up here.

How are sulphured apricot kernels—are they the result of growth or production or the result of what character of growth or production or treatment are they developed?

(Testimony of Raymond L. Engell.)

A. They are pits that are derived from whole apricots that the grower—they generally come from the grower, and the grower normally cuts and pits the apricot. In this particular case he puts the whole apricot into the sulphur house and sulphurs the entire apricot, and then squeezes the pit out of the apricots after they have been sulphured.

Consequently the sulphur penetrates through the meat and into the pit, and they are therefore classified as sulphured pits.

The Court: Squeezes by machine?

A. No, by hand, manually. Sometimes they are cut, but mostly they will squeeze them out. The fruit becomes soft and pliable and just a slight pressure will burst the skin [105] and slide them out.

Q. (By Mr. Eisner): We are interested here in what are called regular apricot kernels, and I will ask you to tell the Court just what are regular apricot kernels.

A. Regular apricot kernels are kernels that come from apricot pits that have been cracked, and the pits are primarily those that are removed in the drying yard at the time of the cutting and placed out in the sun for drying. And, secondly, in a normal canning operation, where they pit apricots for canning, half canning, they are removed in the canner and likewise placed in the sun for drying.

Those are the two classifications normally for regular apricot kernels as far as operations.

(Testimony of Raymond L. Engell.)

Q. And while we are talking about it, what are steamed apricot kernels?

A. Steamed apricot kernels are derived from pits that, through an operation such as making apricot nectar or preserved apricots, it is necessary to remove the pits from the meat, and in so doing they have to heat the apricot up to various temperatures. I am not familiar with the exact temperature, but it does heat the pit to the point where it affects the kernel and it definitely has a characteristic difference from the regular apricot kernel.

Q. Do regular apricot kernels vary in size, color and texture?

A. They vary in size; not as much in color and texture. [106]

Q. Do the variances depend in part on the locality of production of the apricots?

A. It does have some bearing.

Q. Now, Mr. Engell, is there any well established custom amongst those trading in apricot kernels as to the percentage of broken kernels that is permissible in any delivery of regular apricot kernels?

Mr. O'Connor: If the Court pleases, at this time, for the purpose of the record, I will object to any questions directed to the question of custom and usage on the ground that no proper foundation has been laid so far in this case showing that the defendant in this case was actually regularly in the business of selling—either selling or producing apricot kernels, regular or otherwise; upon the further

(Testimony of Raymond L. Engell.)

ground that the evidence thus far in this case has demonstrated, that, to the contrary, he was new in the business, had no knowledge of the customs and usages of this particular business insofar as it relates to apricot kernels; and upon a third and further ground that the plaintiff in this case at no time relied upon the custom and usage of the trade insofar as this particular custom has been referred to in the questions concerned.

And that has been evident from the testimony and the evidence already in the record; the fact that he demanded that, as a part and parcel of this particular contract, that that particular clause be inserted in the contract. [107]

Mr. Eisner: If the Court please, first of all, counsel is in error in his comprehension of the law, that it is necessary to establish that the party who is dealing in a particular commodity was personally familiar with the general and well established custom of the trade.

When he undertakes to deal in a certain commodity, he is bound by the well established customs of the trade in that commodity, whether he is familiar with the customs or whether he isn't familiar with the customs. And in this case we plead specifically, although probably it would not be essential, the fact of the existence of the custom, and the evidence in this case shows clearly that it was relied upon, and it is a custom whether relied upon or not that would be implied a term of the contract, whether express or implied.

(Testimony of Raymond L. Engell.)

And I am proposing to prove by this witness, as counsel had said no proper foundation has been laid—I don't know of any better prepared or more competent witness to testify to the custom of this trade than the witness on the stand, and I submit, if the Court please, that the question is a perfectly proper one, and I have asked him whether such a custom exists.

The Court: Submit the matter?

Mr. O'Connor: Yes, it is, your Honor.

The Court: The objection will be overruled.

Mr. O'Connor: May it be overruled subject to a motion [108] to strike, your Honor?

The Court: Very well. Let the record so show.

Q. (By Mr. Eisner): Rather than to ask the reporter to go back, I will repeat the question, that might be simpler.

I asked you, Mr. Engell, is there any well established custom amongst those trading in apricot kernels as to the percentage of broken kernels that is permissible in any delivery of regular apricot kernels? A. It is a custom that——

Q. You can answer that question yes or no.

A. Yes.

Q. How long to your knowledge has this custom existed?

A. It has been existing as long as I have been connected with our operation.

Q. And now would you state what that custom is?

(Testimony of Raymond L. Engell.)

A. You mean from the standpoint of the time a sale is made or of the operations?

Q. I mean, is there any custom of the trade pertaining to the percentage of broken kernels that is permissible in any delivery under contract for sale of regular apricot kernels?

A. Well, I can speak from the standpoint of the operations; I do have a certain amount of knowledge as to the sales end, and the contract so specifies in each instance on the face of the contract that it must not exceed by weight five per cent of broken kernels by weight. [109]

Now the time of negotiations or confirmation of sale—it may be made by wire or telegram, and reference to that five per cent is not always in the telegram or wire because it is implied that regular apricot kernels would be shipped with not more than five per cent broken kernels by weight. It is established custom in the industry.

Q. Now, Mr. Engell, in the sale of apricot kernels, your regular apricot kernels, does it frequently occur that a certificate of the California Dried Fruit Association is required by the buyer?

A. The buyer sometimes will require a certification by the California Dried Fruit Association, and likewise the seller will also ask for certification, particularly if it is a water shipment.

Q. I will ask you: Will the Dried Fruit Association of California issue a certificate passing regular apricot kernels in which the percentage of broken kernels exceeds five per cent by weight?

(Testimony of Raymond L. Engell.)

A. To my knowledge, no.

Mr. O'Connor: Just a minute, please. I will object to that question on the ground that it is incompetent, irrelevant and immaterial and not within the issues of the matters before the Court in the pleadings and the theory on which the case has been tied up to the present moment.

Mr. Eisner: It is merely cumulative evidence of the [110] question, if the Court please.

The Court: For that limited purpose I will allow it. The objection will be overruled.

A. There have been instances when they have refused to issue a certification when it exceeds five per cent.

Q. (By Mr. Eisner): Mr. Engell, will you tell us how in actual practice and production the percentage of broken kernels is controlled?

A. It is controlled at the time the kernels are cracked—the pits are cracked, and the kernels are removed from the broken shell.

The kernels are separated from the shell by means of, in our particular instance, a flotation method, where the kernels are floated out and the shells go to the bottom and are taken out by a drag chain.

The kernels then proceed to a drying unit which dries the kernels down to a certain moisture content, and then they go over a shaker which has a perforation with holes of various sizes to remove small pieces of kernel, and from there they go on to a sorting belt where they remove broken kernels

(Testimony of Raymond L. Engell.)

that it is felt will—in order to bring the particular pack within the five per cent.

And that is checked periodically to be sure that it meets the requirement of five per cent.

Q. In other words, the percentage of broken kernels is then, [111] you might say, mechanically controlled; is that correct?

A. It is mechanical, generally speaking, but the final operation is done manually to get it within the five per cent, because the broken kernels are kernels that may not always go through a certain size screen.

Q. In other words, if any get through, then they are manually eliminated by taking them off the belt?

A. That is correct.

Q. As the belt passes by those who are acting upon it?

A. That is correct.

Q. Mr. Engell, what are broken apricot kernels generally used for in this country?

A. They are generally used for oil extraction or pressing of oil.

Q. Are they marketed at a low price compared with regular kernels?

A. Yes.

Q. Mr. Engell, can you tell us what the market price of regular apricot kernels, f.o.b. West Coast dock, was on or about the first day of September, 1955?

A. May I refer to a memorandum of sale at approximately that date?

Q. Yes, you may.

The Witness: I am not familiar—

(Testimony of Raymond L. Engell.)

Mr. O'Connor: May I see the memorandum, please? [112]

A. September 1st, 1955. I have a sale made here on August 31st, which was for 17½ cents f.o.b. dock.

Q. (By Mr. Eisner): 17½ cents? A. Yes.

Q. Then the California Packing Corporation actually made a sale at that time at 17½ cents?

A. Yes.

Q. In the sales made at that price, 17½ cents, on August 31, 1955, did the tolerance limit of not more than five per cent by weight of broken kernels apply? A. Yes.

Q. After September 1, 1955, was there a progressive increase in the market price of regular apricot kernels?

A. There was a progressive increase, although we did not participate in that increase in our shop during the rise. We were acquainted with the marketed change, but our particular situation was we were just waiting to see where it went rather than——

Q. Irrespective of whether you sold or didn't sell, if you are familiar, or kept yourself familiar with the market price, will you be good enough to tell us whether there was such a progressive increase in market price after September 1, 1955.

A. I think—I can tell you there was a progressive increase. I can indicate a memorandum of sale that was made on steamed apricot kernels, be-

(Testimony of Raymond L. Engell.)

cause they are sold generally at a differential, [113] slightly less than regulars.

Q. Yes?

A. But a sale was made of steamed apricot kernels during that period of September which I can make reference to. I think, in fact, it was in October.

I would like to make this reference, if you will permit, that on August 31st, when the sale of regular kernels was made at $17\frac{1}{2}$ cents, steamed apricot kernels were sold at $14\frac{1}{2}$ cents, a differential of approximately 3 cents.

On October 12, 1955, steamed apricot kernels were sold—I have a sale here representing 22 cents per pound, which indicates that there was a gradual increase that had been taking place.

Q. Mr. Engell, can you tell us what the market price of regular apricot kernels, f.o.b. West Coast dock, was on or shortly prior to November 16, 1955?

A. I don't have any sales made domestically, other than one made on November 8, 1955, which was for 40 cents per pound dock.

Q. In other words, on November 8, 1955, the sale price was 40 cents f.o.b. dock. Do you have any information pertaining to sales any closer to November 16, 1955 than November 8th?

A. I have a record that was given to me by our sales department on November 11th, sale made into Sweden, which was an export shipment, f.o.b. dock at 42 cents, and one on [114] November 23rd, like-

(Testimony of Raymond L. Engell.)

wise made into Sweden, at a price of 42 cents f.o.b. dock.

Q. 42 cents f.o.b. dock? A. Yes.

Q. Let me ask you: In the case of those sales also which you refer to, were all those sales made with the same limitation of not exceeding five per cent by weight of broken kernels? A. Yes.

Q. Mr. Engell, did you as plant manager, or in your position at California Packing Corporation at any time during 1955 receive notification that you personally would be contacted by Sunset-Sternau Food Company with respect to the cracking of apricot pits for that company?

A. Well, during the period—during the month of October, Mr. Glenny, our sales manager, informed me that I would be contacted by telephone from Sunset-Sternau, some representative of Sunset-Sternau, for the purpose of ascertaining whether we could crack some apricot pits on a toll cracking basis.

Q. And was California Packing Corporation ready and willing to crack upon a toll basis?

A. Yes.

Q. Were you ever contacted at any time by Sunset-Sternau Food Company or anyone on their behalf pertaining to the cracking of apricot kernels? [115]

A. I was not contacted directly by Sunset-Sternau, or, in fact, I do not know whether the person was a party or connected with Sunset-Sternau, but a gentleman by the name of Rudy

(Testimony of Raymond L. Engell.)

Bonzi of Modesto called me on the telephone and asked me if it was possible——

Q. When did he contact you, Mr. Engell?

A. It was somewhere around the middle of November.

Q. 1955? A. 1955, yes.

Q. And did he contact you—I interrupted you.

A. He contacted me by telephone, and I made arrangements to go down to Modesto and meet with him the following day.

Q. Did you actually go to Modesto?

A. I did.

Q. Did you go to the premises of Mr. Bonzi?

A. I did.

Q. Will you state what you saw there pertaining to apricot pits?

Mr. O'Connor: If the Court please, I will object to this line of questioning as being incompetent, irrelevant and immaterial and not being within the issues presented by the pleadings in this case or the issues presented to the Court thus far. What this gentleman's relationship was with Mr. Bonzi is entirely distinguishable from any dealings between the American Almond Company and Sunset-Sternau Company. [116]

Mr. Eisner: I am not offering this, if the Court please, for the purpose of proving any arrangement between California Packing Corporation and Mr. Bonzi. I am offering it to establish that Mr. Bonzi at this time when this witness saw him, had the uncracked apricot pits strewn upon his ground

(Testimony of Raymond L. Engell.)

and they were there, and that there was a conversation pertaining to the cracking of these apricot pits by the California Packing Corporation. That is as far as I propose to go.

Mr. O'Connor: Then I will object on the further ground that it would be hearsay as to this defendant, if the Court please, and not binding upon the defendant.

The Court: For the limited purpose of the offer, I will allow it. The objection will be overruled.

Mr. O'Connor: Subject to a motion to strike.

Q. (By Mr. Eisner): Mr. Engell, to save time, did you then go to Modesto to the premises of Mr. Bonzi? A. I went to the premises, yes.

Q. And will you state what you saw there, if anything, pertaining to apricot pits?

Mr. O'Connor: May it please the Court, so I won't be interrupting, may it be understood that my objections go to the whole line of questioning?

The Court: Let the record so show.

Mr. O'Connor: Thank you.

A. I went to the office of Mr. Bonzi, and there was no one [117] there, so I proceeded to walk out into the grounds, and Mr. Bonzi was out there.

I talked to him and surrounding us was a considerable quantity of apricot pits, strewn out over the ground.

Q. (By Mr. Eisner): Did you have any conversation with Mr. Bonzi pertaining to cracking the apricot pits?

A. I talked to Mr. Bonzi. I said "I can."

(Testimony of Raymond L. Engell.)

Q. I just asked you if you had it; I am not going to ask you the conversation.

Did you have conversation?

A. Oh, yes, yes.

Q. Did you thereafter hear from Mr. Bonzi as to whether or not he wanted the California Packing Corporation to crack the pits?

A. I heard from him, it was probably two or three days thereafter, by telephone, to the effect that he was not interested at that time in having us crack the pits.

Q. Mr. Engell, amongst those trading in natural commodities, such as handled by the California Packing Corporation, and with which you are familiar, is there such a thing as what is known as a type sample?

A. In our particular shop we consider a type sample a sample representing commodities and dried fruits as to regular grades. Likewise a type sample of regular apricot kernels would be a sample to show the quality of the merchandise or commodity, [118] and not anything else, other than to give a buyer an opportunity to see what the regular type of fruit or commodity it might be that he was negotiating.

Q. Would such a sample, in your opinion, Mr. Engell, of apricot kernels, furnished for the purpose for which you have stated, have anything to do with the percentage of broken kernels that would be present in the delivery?

A. It would not.

(Testimony of Raymond L. Engell.)

Q. I am going to ask that you assume that a producer of apricot kernels had a lot of uncracked kernels sufficient to produce 75 tons of kernels, and assume further that the producer cracked just enough of the pits to furnish a sample of kernels to a proposed buyer, leaving the bulk of the pits uncracked; in your opinion, would a sample so furnished be a type sample such as you have indicated to represent the quality of the kernels?

A. I would say it would be.

Q. And let us assume that in such a sample that was furnished, there were no broken kernels whatsoever in the sample that was furnished, in your opinion, would this seller have the right to deliver kernels in which the percentage of broken kernels did not exceed five per cent by weight?

Mr. O'Connor: Just a moment. If the Court pleases, I will submit that that is not a proper type of hypothetical question and calls for the opinion and conclusion of the witness upon the subject matter of whether or not a person [119] selling had the right to do a certain thing.

Mr. Eisner: The witness is qualified certainly as an expert and the question calls for his opinion.

In the case of an expert witness who is qualified, you can ask for his opinion.

The Court: I will allow it, subject to a motion to strike, and overrule your objection.

Mr. Eisner: You may answer.

A. I would say it would be implied that there

(Testimony of Raymond L. Engell.)

would be five per cent tolerance permitted for broken kernels.

The Court: Is this a sample of 20 sacks?

Mr. Eisner: No. I mean, if the Court please, this witness is testifying——

The Court: I mean this sample that was sent on.

Mr. Eisner: The sample that was sent on was 200 pounds.

The Court: 200 pounds. I wanted to refresh my memory.

Mr. Eisner: Two sacks that were cracked for this particular purpose.

Q. And in the same way, Mr. Engell, if there were more than five per cent broken kernels in the sample, the type sample that was submitted, would the buyer be entitled to receive kernels with no more than five per cent broken kernels?

A. Correct.

Mr. Eisner: That is all. [120]

Cross Examination

Q. (By Mr. O'Connor): Mr. Engell, when more than five per cent by weight of broken kernels occurs in a delivery of say a one hundred pound bag of kernels, does that seriously affect the value of those kernels? A. I would say it would, yes.

Q. Well, if there was five per cent by weight of broken kernels in a one hundred pound bag that would mean, would it not, Mr. Engell, that there would be five pounds of that bag by weight that would consist of broken kernels?

(Testimony of Raymond L. Engell.)

A. Right.

Q. Am I right on that? A. Yes.

Q. And if there were ten per cent by weight of broken kernels, of course the value of that bag would be diminished, would it not? In other words, you couldn't use the broken kernels?

A. It depends on the operation, yes, I would say it would.

Q. It would diminish the value, would it not?

A. Yes.

Q. In connection with that, I think you had a contract there, Mr. Engell, did you?

A. I have a memorandum of sale.

Q. This five per cent clause, that the merchandise shall not exceed five per cent by weight broken kernels, is a standard clause in your contracts of California Packing Company; isn't [121] that correct?

A. I will have to answer that: It is not a printed clause; it is a qualified clause that is added on the contract.

The Court: What was that answer?

A. I say it is not a printed clause. It is a clause that is qualified and entered on the face of the contract.

Q. (By Mr. O'Connor): Would you mind showing me that contract you referred to, Mr. Engell?

A. This is the memorandum of sale from which the contract is written up.

Q. Yes. And this contract, which was a sale to American Almond Products under date of Aug-

(Testimony of Raymond L. Engell.)

ust 31, 1955, does have the qualifying phrase "Not exceeding five per cent by weight broken," doesn't it?

A. That is correct.

Q. That is the standard clause, and buyers and sellers generally agree upon that, do they not; they reduce it to the contract; they put it in the contract?

A. That is correct.

Q. Because that contract form that you have there is used for other products, is it not, that California Packing Corporation sells, isn't that so?

A. Yes.

Q. So that if a delivery exceeded five per cent and went as high as ten and fifteen per cent by weight of broken kernels, [122] the buyer normally would reject it, would he not?

A. Correct.

Q. In other words, if it was ten per cent in a hundred pound bag he would be paying for ten pounds of broken kernels at a kernel price?

A. Yes.

Q. If the price were seventeen and a half cents per pound he would be paying for ten pounds that are of little or no value to him; isn't that correct?

A. If he accepted delivery, he would.

Q. And where a sample is submitted to a buyer and it contains more than five per cent by weight of broken kernels, the buyer is put upon notice of that fact; isn't he?

A. I would say it this way: That if a sample contained more and it was a type sample from our particular shop, the type sample would not necessarily have to comply with the five per cent; it

(Testimony of Raymond L. Engell.)

could be one or five or ten. It is implied that the shipment—if the sale is consummated, the shipment would be within five per cent.

Q. Would have to comply within the five per cent?

A. We use type samples on other commodities in our business that represent a regular grade of fruit.

Q. Mr. Engell, there is a regular business done in apricot kernels, isn't there, year in and year out during all of the years you have been at California Packing Corporation? [123]

A. Yes.

Q. In normal years, the average year, let us say, is there much variance in price in apricot kernels during the course of a year?

Mr. Eisner: That is objected to as being irrelevant, incompetent and immaterial.

Mr. O'Connor: It is preliminary, if the Court please.

The Court: I will allow it subject to a motion to strike.

A. I would say there is a variance in price throughout the—at certain times there has been.

Q. (By Mr. O'Connor): What is the average variance in price of apricot kernels in average years?

Mr. Eisner: That is objected to—same objection, if the Court please.

Mr. O'Connor: Preliminary, if the Court please,

(Testimony of Raymond L. Engell.)

bearing upon the claim of damage in this case and subject to being connected up.

The Court: I will allow it subject to a motion to strike. Being a farmer myself, we get a frosty year or what not. We are in the realm of speculation which can't possibly spell out very much legally.

Now we will proceed with that admonition.

A. I would say that there is a variance because of supply depending upon the crop from year to year. The crop may [124-125] sometimes—I will put it this way: The market may open up, and before the crop is completely harvested it will be determined that there is a shorter crop and the market will strengthen accordingly, which is common in other commodities likewise in our business.

Q. (By Mr. O'Connor): What was the variance in the price range of regular apricot kernels during the year 1954, the year preceding '55?

A. That I couldn't answer you; I haven't looked up the records on that.

Q. What was the variance in price of regular apricot kernels during the year 1953?

A. Likewise I do not have the information before me, but I do know that it has varied some years.

Q. Mr. Engell, what was the variance in price of regular apricot kernels during the year 1956?

A. The variance in 1956 to my recollection is varied from—on regular apricot kernels?

Q. Regulars, yes.

(Testimony of Raymond L. Engell.)

A. From thirty-eight cents a pound to close to at least fifty cents a pound.

Q. Do you know of the firm of Sewell Brown & Company? A. Yes.

Q. Where are they located?

A. A few miles out of San Jose. [126]

Q. Are they engaged in the business of selling and producing apricot kernels? A. Yes.

Q. Were they in the year 1955? A. Yes.

Q. Did they have a fire down in their plant in the year 1955?

A. They had a fire there the latter part of September, I think somewhere around the 20th, or in that neighborhood.

Q. And were you familiar with market conditions of apricot kernels at that time?

A. I was, yes.

Q. Did the fire in question with the destruction of their supply of apricot kernels affect the price of the market?

A. As I recollect it, the fire—approximately four hundred tons of apricot kernels would be removed from the market because of the fire, and consequently a shortage developed in the market.

Q. A shortage of apricot kernels?

A. A shortage of apricot kernels.

Q. A shortage developed and then the regular laws of supply and demand went into effect and the price of apricot kernels rose thereafter?

A. That is correct.

Q. So it was a factor and a vital factor in this

(Testimony of Raymond L. Engell.)

area [127] regarding the price of apricot kernels, was it not, Mr. Engell?

A. It was a factor. There was one other factor that had a determination on the price advancing, was the European almond crop was not in the normal supply, and the demand in Europe took a considerable upward trend which likewise increased the price because of supply.

Q. And so far as domestically is concerned here in California, the Sewell Brown fire definitely caused an upward swing in the market for apricot kernels, didn't it? A. Yes.

Q. By the way, did you have any other contracts for the sale of kernels to the American Almond Products during the year 1955 other than that one sale of August 31st? A. Yes.

Q. When else did you sell to them?

A. August 26, 1955, there was a sale at seventeen and a half cents; August 30, 1955, another sale at seventeen and one-half cents.

Q. Were there any sales after this date to American Almond Products Company, Mr. Engell?

Mr. Eisner: In 1955?

Mr. O'Connor: Yes.

A. The only one I have referred to already; that was the one on August 31st.

Q. Yes, August 31st. [128]

A. I have no others until November 8th; I think that is in the record, at forty cents a pound.

The Court: It is in the record.

(Testimony of Raymond L. Engell.)

Q. (By Mr. O'Connor): Yes, that is November 8 and that likewise contains the clause "Not exceeding five per cent by weight broken?"

A. That's right.

Q. As a matter of fact, all three orders of all three contracts contain that clause, do they not?

A. Yes, sir.

Q. And those were all three contracts with American Almond Company?

A. That is correct.

Q. What would you say the variance was in 1954 in the price of apricot kernels that you delivered?

A. I said I did not have that information here. I have recollection—I know there were years when there have been upward fluctuations, but I can't testify that '54 was one of those years.

Q. Did you ever have any carry-over of apricot kernels in any years?

A. There have been some years, yes.

Mr. O'Connor: I have no further question, your Honor.

The Court: I was about to take a recess.

Mr. Eisner: All right; very well, your Honor.

The Court: I would like you to get through with this witness so he can go and attend to his business.

Mr. Eisner: I just have one or two questions.

The Court: That is the reason I called your attention to the fact.

(Testimony of Raymond L. Engell.)

Redirect Examination

Q. (By Mr. Eisner): Mr. Engell, counsel has called your attention to, I believe, three contracts with American Almond Products Company, two at seventeen and a half cents and one at forty cents. I will ask you whether the California Packing Corporation delivered all of the regular kernels called for by these contracts at the prices specified in the contracts.

A. To my knowledge they have been.

Q. Now, Mr. Engell, you testified that it is the practice, and I think your documents will show, for California Packing Corporation to expressly include in its contracts the tolerance of five per cent limitation of broken kernels by weight. Whether or not such a clause is expressly included in the contract, Mr. Engell, is it a fact that the same tolerance is implied whether expressed or unexpressed.

A. That is correct.

The Court: You may be excused.

Mr. Eisner: That is all.

Mr. O'Connor: One question, may I ask it, your Honor?

The Court: You may. [130]

Recross Examination

Q. (By Mr. O'Connor): Mr. Engell, was the clause put in these particular contracts with American Almond at their request?

A. It is a common procedure and a customary practice to put the clause in because it is not printed in the contract.

(Testimony of Raymond L. Engell.)

Q. It is common procedure and customary practice to put that clause in a contract?

A. It is accepted by the industry in all dealings that we make.

Q. And it is the customary practice to put it into the written contract; is that correct? The reporter has to hear your answer.

A. Yes.

Mr. O'Connor: Thank you.

Further Redirect Examination

Q. (By Mr. Eisner): Mr. Engell, it is customary with California Packing Corporation. Do you know whether or not it is customary with other producers and sellers of apricot kernels, such as Rosenberg Brothers & Company, such as Sewell Brown & Company, to expressly include such a tolerance clause, or to let it be implied?

Mr. O'Connor: Just a moment, if the Court please. That is asking the witness to qualify himself as having knowledge of a particular trade practice of other companies and he has [131] not been qualified as having such knowledge.

The Court: If he knows, he may answer.

A. I know that other companies do use that clause.

Q. (By Mr. Eisner): Do they include it or do they not include it—I mean expressly?

A. I would say they include it.

Mr. O'Connor: I will withdraw the objection, your Honor.

Q. (By Mr. Eisner): Are you personally fa-

(Testimony of Raymond L. Engell.)

miliar with whether or not Rosenberg Brothers & Company expressly include the clause?

Mr. O'Connor: Just a minute.

A. That I couldn't answer correctly, other than what knowledge I have gained through association with the sales department to the effect that other companies use the five per cent broken clause.

Mr. Eisner: That is all.

Mr. O'Connor: Thank you. [131-a]

The Court: We will take a recess.

(Recess.)

Mr. Eisner: Mr. Ehrenfeld, would you take the stand, please?

FERDENAND EHRENFELD

called as a witness on behalf of the Plaintiff, having been first duly sworn, testified as follows:

The Court: What is your full name?

A. Ferdenand Ehrenfeld.

The Court: Where do you live?

A. San Francisco.

The Court: What is the address?

A. 1360 Montgomery.

The Court: 1360 Montgomery Street?

A. That is right.

The Court: Your business or occupation?

A. I have been with Rosenberg's for about 40 years.

The Court: What?

A. I have been with Rosenberg about 40 years.

The Court: In what capacity?

(Testimony of Ferdinand Ehrenfeld.)

A. First as export—I started working for them; I gradually became export manager, then manager, and the last few years I have been active consultant.

The Court: What is the nature of your work? What do you do? [132]

A. At present I keep in contact with the general conduct of the business, and whereas I don't do much detail work, I do know pretty well what is going on, particularly in sales.

The Court: I didn't make very much headway; I will turn him over to you.

Direct Examination

Q. (By Mr. Eisner): Mr. Ehrenfeld, you stated that you have been associated with Rosenberg Bros. and Company for 40 years? A. About 40 years.

Q. What is the business of Rosenberg Bros. and Company?

A. Mainly the buying, packing and selling of dried fruit and nuts, including such nuts as apricot kernels.

Q. And has it been engaged in that business during all the period that you have been associated with the company? A. It has.

Q. And is part of its business in producing and selling apricot kernels?

A. In buying them from the growers and cracking them and selling them.

Q. Would you say that Rosenberg Bros. and Company is probably the largest producer and seller of apricot kernels?

(Testimony of Ferdinand Ehrenfeld.)

A. I think usually we have handled more than any one of our competitors.

Q. Mr. Ehrenfeld, we have already, I believe, had sufficient [133] testimony in the record of the various classes of apricot kernels, regular, steamed and sulphured, with which you are familiar?

A. Yes, I am.

Q. Is there any well established custom of the trade amongst those trading in apricot kernels as to the percentage of broken kernels permissible in any delivery of regular apricot kernels?

Mr. O'Connor: Just a moment, if the Court please; I make the same objection which I have urged heretofore to the introduction of evidence in behalf of custom and trade usage insofar as apricot kernels are concerned, as I made to Mr. Engell's testimony, namely, number one, there is no proof of reliance by the plaintiff upon custom or usage insofar as the defendant is concerned; there is no evidence that the defendant was regularly engaged in the business of selling apricot kernels, or buying them, or was aware of the custom and usage of the trade at the time of this alleged transaction.

The Court: Do you have in mind the foundation for that testimony?

Mr. O'Connor: Yes, I do, if the Court please.

The Court: Lay a better foundation, if you can.

Q. (By Mr. Eisner): Mr. Ehrenfeld, are you familiar with the trading in apricot kernels?

A. Yes, I am.

(Testimony of Ferdinand Ehrenfeld.)

Q. Have you been familiar with it during all the period in [134] which you have been associated with Rosenberg Bros.?

A. For by far the major part of it.

Q. And are you familiar and do you keep posted with the market prices of apricot kernels?

A. I am.

Q. I will ask you again the question to which objection has been made.

Mr. Eisner: Will the reporter kindly read the question?

The Court: I suggest you reframe your question.

Mr. Eisner: All right, I will repeat it.

Q. Is there any well established custom of the trade amongst those trading in apricot kernels as to the percentage of broken kernels permissible in any delivery of regular apricot kernels?

A. Yes, there is.

Mr. O'Connor: Just a moment. Now, if the Court please, if the Court desires, I will just refer back to my objection to the testimony of Mr. Engell and adopt my objection to his testimony on custom.

The Court: You have got your running objection to custom. The record so shows.

Mr. O'Connor: Thank you.

Q. (By Mr. Eisner): You have answer "Yes?"

A. Yes, sir.

Q. I will ask you, how long has this custom to your knowledge existed?

A. As long as I know anything about apricot

(Testimony of Ferdinand Ehrenfeld.)

kernels, which [135] is, I would say, moderately, 30 years.

Q. That would be for the past 30 years?

A. Yes.

Q. That that general custom has existed?

A. Has existed.

Q. Will you please state what the custom is?

A. Regular kernels are not supposed to contain more than five per cent broken.

Q. Is that by weight? A. By weight.

Q. Let me ask you, Mr. Ehrenfeld, does this custom apply in the case of all sales of regular apricot kernels without setting forth the qualifications in the contract? A. It does.

Q. What is the practice of Rosenberg Bros. and Company, whether in mentioning or not mentioning the percentage of tolerance of broken kernels in its contracts of sale of regular apricot kernels in the domestic market?

Mr. O'Connor: If the Court pleases, to that question I raise the objection that it is hearsay so far as this defendant is concerned; it is incompetent, irrelevant and immaterial to the issues before the Court in this particular case what the practice of Rosenberg is or is not.

The Court: Do you know what the practice is?

A. I do. [136]

The Court: The objection is overruled. Proceed.

The Witness: I looked up quite a number of contracts before I came over here, and I found that

(Testimony of Ferdinand Ehrenfeld.)

some of them do show the stipulation not over five per cent broken, and others do not. They, however, read "regular kernels," and that seems to have satisfied both the buyer and the seller, and under such contract I am expected to make a delivery that does not exceed five per cent broken.

Q. (By Mr. Eisner): In other words, you have found in some instances Rosenberg Bros. and Company does include an expression of the clause, and in some cases it does not; is that correct?

A. I might supplement this by saying that frequently the contracts are not made in the head office; they are made by some of the agents. They send them in, and some put it in and others don't, and on the contracts that we make in the office, I happened to find that most of them do read "for regular kernels."

Q. And make no mention——

A. And make no mention.

Q. ——of the tolerance? A. That is correct.

Mr. Eisner: I am going to show this witness this contract. You have already seen it.

Mr. O'Connor: Yes. [137]

Q. (By Mr. Eisner): I show you this contract, Mr. Ehrenfeld, dated September 23, 1955, with American Almond Products Company, and ask you if this is a contract made by Rosenberg Bros. and Company with American Almond Products Company for sale of regular apricot kernels?

A. It is such a contract.

Q. And I call your attention to the fact that this

(Testimony of Ferdenand Ehrenfeld.)

contract makes no mention of any percentage of broken kernels; is that correct?

A. That is correct.

Q. And whether it mentions that or not, that tolerance would be implied, is that correct?

A. It would be implied.

Mr. Eisner: We offer this contract in evidence.

The Court: Let it be admitted and marked.

The Clerk: Plaintiff's Exhibit 43 admitted and filed in evidence.

(The contract referred to was marked Plaintiff's Exhibit No. 43 in evidence.)

Mr. O'Connor: My objection likewise goes to this contract being in evidence, your Honor.

The Court: You have a running objection.

Q. (By Mr. Eisner): Mr. Ehrenfeld, are export sales of apricot kernels usually accompanied by certificates of quality issued by the Dried Fruit Association of California? [138]

Mr. O'Connor: If the Court please, same objection, incompetent, irrelevant and immaterial, calls for matter which is not at issue in this action, and is hearsay as far as this defendant is concerned and not binding upon him.

Mr. Eisner: It is merely, as I stated before, cumulative evidence of this custom, if the Court please.

The Court: For that limited purpose, I will allow it.

The Witness: May I ask you to repeat the question?

(Testimony of Ferdenand Ehrenfeld.)

Q. (By Mr. Eisner): Yes. I asked you: Are export sales of apricot kernels usually accompanied by certificates of quality issued by the Dried Fruit Association of California?

A. Usually export sales are and domestic sales made for steamer shipment.

Q. Do you know whether or not the Dried Fruit Association of California will issue a certificate of quality for regular apricot kernels that exceed five per cent of broken kernels by weight?

Mr. O'Connor: Same objection, if the Court please, for the record.

The Court: Same ruling.

A. They will not.

Q. (By Mr. Eisner): Mr. Ehrenfeld, do you know what practice is followed in the plants of Rosenberg Bros. and Company with reference to grading regular apricot kernels, so as to control the percentage of broken kernels? [139]

A. We use mechanical means, such as screening and blasting, air blasting, and then, dependent upon the percentage of brokens still in the delivery that is being tested right along, we supplement that by hand picking when need be.

Q. What market is there in the United States for broken kernels?

A. For the pressing of oil.

Q. What difference in price is there in the United States between broken kernels and regular kernels at any given time, approximately?

A. There is a substantial difference in price.

(Testimony of Ferdinand Ehrenfeld.)

Q. Suppose that regular kernels are selling at 18 cents, what would broken kernels, in your opinion, sell at?

A. I would say, depending on the condition of the broken kernels, the percentage of dirt they may have, or shells, all the way from 4, 5 to 7 cents.

Q. 4 to 7 cents?

A. That is as close as I can answer.

Q. Mr. Ehrenfeld, did Rosenberg Bros. and Company make any sales of regular apricot kernels about the first day of September, 1955?

A. May I be permitted to look at records?

Q. Yes.

A. We made a sale on August 29, 1955.

Mr. O'Connor: If the Court please, apparently we are [140] getting into a line of interrogation of this witness as to what sales were made by Rosenberg Bros. of kernels during a specified period of time.

The witness has not been qualified as to whether or not at that time he was in charge of the department selling apricot kernels, for Rosenberg Bros., and whether he is familiar personally with the records.

The Court: Are you familiar with the records?

A. I am completely familiar with the records, and I checked it over personally. And I was very familiar with the operations of the firm all during this period, particularly sales.

Mr. O'Connor: May it please the Court, I see the witness has a paper in his hand, and I assume

(Testimony of Ferdinand Ehrenfeld.)

from the statement of the witness he is obviously eager to testify.

Mr. Eisner: Now, just a moment.

Mr. O'Connor: And I assume that that contains an excerpt from the records of Rosenberg Bros., and if that is so——

The Court: What is this?

A. This is a record I made of the various sales of kernels made on the basis of contracts from August 29, '55, to November 16, '55, and the evidence of each sale is available to the Court if it desires.

The Court: When was it made?

A. Last week.

Mr. O'Connor: May it please the Court, my objection to [141] this testimony——

The Court: There is nothing before the Court at this time. Let us proceed.

Q. (By Mr. Eisner): I asked you, Mr. Ehrenfeld, whether you made any sales about the first day of September, 1955.

A. The closest day that I could find is August 29, '55, and another sale—the next sale on September 6th.

Q. What was the sale?

Mr. O'Connor: Again, may it please the Court, I submit that the witness cannot refresh his recollection from a document which is not the best evidence. The best evidence is the records themselves, not this man's excerpts.

(Testimony of Ferdenand Ehrenfeld.)

The Court: He is entitled to them if he presses it.

Mr. Eisner: If he wants this witness to go back and bring the records of these sales—in other words, the witness has made a summary from the records, and if he wants the original records produced here, we will produce them for him.

The Court: Very well; with that understanding, you may proceed.

Mr. O'Connor: I do press it.

Mr. Eisner: All right.

Q. Now, Mr. Ehrenfeld, I will ask you if you can tell us of your experience and of your knowledge of the market condition, what was the market price of regular apricot kernels f.o.b. [142] dock San Francisco on or about the first day of September, 1955? A. 18 cents a pound.

Mr. O'Connor: May it please the Court, the witness is again testifying from a record which is not the best record.

The Court: Counsel assures me that he will bring up the original records in the interests of time.

The Witness: I also assured you the evidence is available. This was taken from sales promotion by me personally.

Mr. O'Connor: I will test him out on cross-examination.

The Court: All right, proceed.

Q. (By Mr. Eisner): Mr. Ehrenfeld, irrespec-

(Testimony of Ferdenand Ehrenfeld.)

tive of these sales, are you familiar with the market value, the prices? A. I am.

Q. And according to your testimony, from your knowledge, was 18 cents the prevailing market price for regular apricot kernels f.o.b. dock San Francisco on or about the first day of September, 1955?

A. The exact date I have here is August 29th.

Q. Was this the price for regular apricot kernels, of five per cent, not exceeding five per cent of broken kernels? A. It was.

Q. Mr. Ehrenfeld, after the 1st day of September, 1955, and between that date and the 16th day of November, 1955, can you state whether or not the market price of regular [143] apricot kernels increased? A. Yes, it did increase.

Q. Can you tell us approximately how that market price increased over that period, indicating the development?

A. Well, I can give you the dates of a number of sales made during this period; I can produce evidence afterwards if required.

Q. Yes.

A. On August 29th it sold at 18 cents; on September 17th at 20 cents; September 27th and 29th at 28 cents; October 25th at 31.2 cents; October 31st at 40 cents; November 14th at 41 cents; November 16th at 43 cents, per pound, f.o.b. dock.

Q. And in your opinion were those prices the fair market price of regular apricot kernels at these dates? A. Yes, they were.

(Testimony of Ferdenand Ehrenfeld.)

Q. And on November 16, 1955, Rosenberg Bros. and Company actually sold regular apricot kernels f.o.b. dock at 43 cents; is that correct?

A. We did.

The Court: I am allowing this testimony to go in with the understanding that you will produce these contracts.

Mr. Eisner: Yes.

Would it be satisfactory, counsel, without bringing this witness back, if he delivers these contracts to me and I can submit them to you, or would you like to go down to Rosenberg Bros. to see them?

Mr. O'Connor: Let's wait until we finish the cross examination of Mr. Ehrenfeld and something may develop.

Mr. Eisner: All right.

The Court: Do I understand that you are retired from Rosenberg's?

A. No, I am a consultant on the permanent wage roll and I go in about five or six hours a day.

Q. (By the Court): You are still on the pay-roll, are you?

A. Yes.

The Court: That is important. Proceed.

The Witness: I think so, too.

Q. (By Mr. Eisner): Mr. Ehrenfeld, is it customary in the trade of merchandise such as is handled by Rosenberg Bros. and Company, dried fruits, nuts, including apricot kernels, to furnish what are known as type samples?

A. It is done frequently.

(Testimony of Ferdinand Ehrenfeld.)

Q. And what are type samples?

A. They are to show the buyer the general characteristics and quality of the particular article, whether it is fruit or nuts or anything else.

Q. Mr. Ehrenfeld, if a type sample of apricot kernels is furnished to the buyer, would that, in your opinion, have anything to do with the percentage of broken kernels that would be present in the delivery? [145]

A. It would not.

Q. I am going to ask you to assume that a producer of apricot kernels had a lot of uncracked pits sufficient to produce 75 tons of kernels, and assume that the producer cracked just enough pits to furnish a sample of kernels to a proposed buyer, leaving the bulk of the pits uncracked, in your opinion would a sample so furnished be a type sample to indicate to the buyer the quality of the kernels?

A. It would be; that is the intent of it.

Mr. Eisner: That is all.

Cross Examination

Q. (By Mr. O'Connor): Mr. Ehrenfeld, I think you have testified on your direct examination you are familiar with the market price of apricot kernels; is that correct?

A. That is correct.

Q. That is part of your job at Rosenberg Bros., is it, sir?

A. It is part of my job of keeping familiar with the market prices, current business, yes.

Q. Mr. Ehrenfeld, can you tell me what the

(Testimony of Ferdinand Ehrenfeld.)

market price for apricot kernels, regular apricot kernels, was during the year 1954?

A. I cannot.

Q. Were you working for Rosenberg Bros. at that time?

A. If I were to depend on my memory of what happened in '54 I would be in a bad fix; I couldn't. I could give it to [146] you from the records. I can give it to you for a more recent date, but I couldn't give it to you for that period; I would have to look it up.

Q. Can you give me at this time——

A. Yes, I can.

Q. Wait until I finish the question, sir.

Can you give me from your recollection the market price of regular apricot kernels during the year 1953? A. No, I cannot.

Q. Can you give me from your memory the market price or prices of apricot kernels during the year 1956? A. Yes, I can.

Q. And did you refresh your memory on the 1956 prices before you came to court?

A. It's current every day; there is still some business being done.

Q. There is still business being done?

A. That's right.

Q. And what is the price of apricot kernels today?

A. The last quotation I heard it was 43 cents. It was up to 50 and 52.

Q. What year was the lowest——

(Testimony of Ferdinand Ehrenfeld.)

A. It is a very fluctuating commodity.

Q. What was the lowest and the highest range of prices?

A. I would say from 38 to 52 or 52½. [147]

Q. That would be more or less the normal variance, would it?

A. You have a different price level; I think of percentage it would be the normal range, but without being able to add up and give you the figures for the years preceding 1955, I have seen fluctuations of 50 to 60 per cent in the rate of kernels during the season because it is a peculiar class of commodity.

Q. Mr. Ehrenfeld, what year did the price fluctuate 60 per cent?

A. I am speaking from memory; I think I should be able to find out for you. I said 50 to 60 per cent. I believe it can be found.

Q. What was the fluctuation in 1953?

A. That I can't tell you.

Q. What was the fluctuation in 1954?

A. I cannot tell you. I am speaking on rough memory over many years, and those things stand out to you and there was a fluctuation.

Q. Are you in charge of the sales of apricot kernels in your organization?

A. I have contact with every more important sale that is made in the firm, and I know it in general before it is made and after it is made.

Q. How much by volume of sales did Rosenberg

(Testimony of Ferdinand Ehrenfeld.)

Bros. make with reference with regular apricot kernels during the year 1955? [148]

A. You mean total volume?

Q. Yes. A. Of sales?

Q. Yes. A. During the season '55?

Q. Yes.

A. I would remind you I am guessing, because you asked me a question, so you have to give me a certain leeway. I would imagine during that season Rosenberg sold close to a thousand tons of all kinds of kernels.

Q. Does that include the steamed?

A. It would.

Q. It did; how much regular? A. What?

Q. How much of regular apricot kernels were sold?

A. That again is roughly. I would say the relation at that time may have been about three to one, maybe two to one or three to one, between regular and steamed kernels.

Q. That is in tons or pounds? A. Tons.

Q. How much was sold during the current year '56-'57 of regular apricot kernels?

A. There was a smaller apricot crop and consequently I would say this season Rosenberg's should handle of kernels bought [149] and sold in their own name, between five and six hundred tons, of all types combined.

Q. Mr. Ehrenfeld, what does that five per cent clause mean by way of weight of broken kernels?

(Testimony of Ferdinand Ehrenfeld.)

A. Well, there are 95 per cent of the whole kernels and the others can be broken.

Q. And if it exceeds five per cent by any appreciable amount, the shipment can be rejected; is that it?

A. Yes, it is not a delivery of the contract.

Q. In other words, it wouldn't be profitable for the buyer to accept delivery of over five per cent?

A. I don't know what it would do to the buyer, but I know I cannot get an Association certificate and if I don't furnish the certificate, I haven't made a delivery, because my contract calls for a certificate.

Q. You furnish certificates?

A. The Dried Fruit Association examines the shipment and furnishes an inspection certificate.

Q. I notice in connection with Plaintiff's Exhibit No. 43—this is a contract between your firm and the American Almond Products Company, is it?

A. That's right.

Q. And signed by representatives of both firms; isn't that correct?

A. Let me see. Evidently, yes. [150]

Q. By Mr. Kaplan of American Almond and by somebody else of your firm?

Mr. Eisner: That document speaks for itself, if the Court please.

Q. (By Mr. O'Connor): Is that the regular and customary mode of doing business in the sale of apricot kernels, you enter into a written contract?

A. You enter into a written contract unless you

(Testimony of Ferdinand Ehrenfeld.)

have some other evidence of sales confirmation. You may have an exchange of cables or confirmation, but that is the—anything that embodies the terms of sale.

Q. Now, with this shipment to American Almond Products did you furnish one of those certificates? A. May I look at the contract?

Q. Yes.

A. I would like to point out to you the requirement of quality. May I be permitted to quote from the contract?

Q. To what paragraph are you referring?

A. Inspection.

Q. Yes.

A. "In view of the recognized hazard of water shipment due to climatic and other conditions, buyer hereby expressly assumes all risks provided seller furnishes a sworn certificate of weight and certificate of inspection (or the arbitration findings hereinafter provided for) of the Dried Fruit Association of California and said certificate shall be conclusive as [151] to weight, quality, grade and condition."

If the seller doesn't furnish it, it becomes automatically subject to arbitration on the other side.

Q. Oh, I see; arbitration where?

A. At the point of destination. I think that is a provision in the contract; I don't know just where, but I can get it.

Q. That is arbitration in California—there is an

(Testimony of Ferdinand Ehrenfeld.)

arbitration committee of the Dried Fruit Association of California?

A. There is one in case the shipper disagrees with the inspector's judgment. If he says, "Now this man has turned down this shipment and I think that shipment is right," then the man can ask for arbitration here, and these arbitrators either support or do not support and sustain the inspector.

Q. Yes. And I notice that in New York, arbitration in New York shall be held before the Association of Food Distributors, Inc.

A. Well, the contract speaks for itself.

Q. Yes. Is your firm a member of that Association in New York?

A. I believe we are a member, yes, although it is mostly for New York firms. It is mostly for the New York trade. I would like to add that my comments have been made on quality matters.

Q. On quality matters?

A. Yes, because that is what you asked me about. [152]

Q. Yes. The question of the percentage of weight over five per cent is not involved in a sample, is it? A. May I ask you to repeat?

Q. In a type sample the weight by broken kernels is not involved; it is just the quality that is involved?

A. That is the purpose of the type sample.

Q. Yes.

(Testimony of Ferdinand Ehrenfeld.)

A. You asked if that was the purpose of a type sample.

Q. Do you sell through a broker in New York? Or do you sell direct? Do you have offices there and do you sell direct?

A. We have no office. We generally sell through a broker, although we frequently have occasion to talk to the buyer direct, or the buyer comes out here.

Q. Is there anything to indicate on this contract whether it was sold through a broker or not?

A. I should think the contract would show it, would it not?

Q. It doesn't seem to; I just wondered whether you could tell.

A. The broker's name isn't shown. It is my recollection that the man who signed this contract, Mr. Arnold, negotiated directly with one of the gentlemen of the American Almond Company and talked to him about the price and the broker would get a brokerage on it, because the broker is entitled to get the brokerage.

Q. And did the broker sign on your behalf?

A. You are speaking of this deal? [153]

Q. Yes.

A. This deal, to my recollection, was made in California and it was signed here. Again I have to refer to the contract.

Q. By Mr. Arnold?

A. By Mr. Arnold and these people here.

Q. Mr. Arnold is the head of Rosenberg's?

(Testimony of Ferdinand Ehrenfeld.)

A. Mr. Arnold is the manager of the firm.

Q. But this was sold through a broker, that is your recollection?

A. It was sold—the negotiation was made here to my recollection, but the broker would get his brokerage, but the sale was made right here.

Mr. O'Connor: No questions.

Mr. Eisner: Let me ask, counsel, do you want to have the contracts produced to which this witness has testified as to the prices?

Mr. O'Connor: Let me ask one further question; that might dispose of it.

Q. Mr. Ehrenfeld, you do not customarily handle the negotiations for these various sales of apricot kernels, do you?

A. I do not customarily talk to the buyers, but I talk to the boys in the office who usually are courteous enough to ask me what I think about it before they make a fairly substantial sale.

Q. They do the regular work; you don't do the regular work? [154]

A. I don't do the, let us say, detail work, may I put it that way. I put in five or six hours a day.

The Court: Would it be a fair statement to say that you approve or disapprove?

A. Yes, I believe that is as clearly as I could state that.

Q. (By Mr. O'Connor): By the way, were you absent or away from Rosenberg Bros. at any time during the past five years? A. I was.

Q. For how long a period of time?

(Testimony of Ferdenand Ehrenfeld.)

A. I think I was away in Europe in 1954 for about four or five months, and I was away last year traveling for the firm six weeks last summer.

Q. Were you ever out of employment from Rosenberg's?

A. I was constantly in a consulting capacity and constantly on their payroll. Let me be correct; I think I go back about 38 years.

Q. I am speaking of just the past five years.

A. Yes, I was constantly on their payroll, and I was constantly there as a consultant, and particularly so in the last two or three years.

The Court: I knew that was important.

The Witness: More active than previously.

The Court: Now, do you wish these contracts produced?

Mr. O'Connor: No, I don't think it is necessary, your Honor. [155]

The Court: Now you are excused. You can go back and go to work.

The Witness: Thank you, your Honor.

The Court: Call the next witness.

JACK M. KAPLAN

recalled to the witness stand, having been previously sworn, testified further as follows:

Recross Examination—(Resumed)

(The reporter read the last question and answer of the witness' previous examination.)

Q. (By Mr. O'Connor): Mr. Kaplan, how many

(Testimony of Jack M. Kaplan.)

pounds of regular apricot kernels did you have on order on September 20, 1955 including those you had on order with Sewell Brown and Company?

A. Well, I have a summary sheet which is an extract from my records. This summary sheet does not give me the dates of delivery; that is to say, I may have some contracts here which may have been partially or completely fully executed as to delivery prior to that date, so I would want you to clarify it. Do you want all the tonnage partially delivered or undelivered; is that what you want?

Q. Delivered or undelivered.

A. Delivered or undelivered. And of course, I may have, as another clarificationary question, I may have—I assume you want the contracts which refer to kernels of that crop year, because conceivably I might have a small carry-over delivery [156] from the prior contract year.

Is that correct?

Q. That would be correct.

A. Well, I haven't got it summarized, but I can give you the individual figures as we go along and we can summarize it.

I have from Sewell Brown Company the figures I have previously indicated, which total 385,000 pounds, Sewell Brown contract.

I have two contracts from California Packing Corporation, one dated August 26th and one August 31st, total poundage 210,000 pounds.

We will take them all in pounds.

(Testimony of Jack M. Kaplan.)

And I have as the next contract on my contract register, the contract with Sunset-Sternau Company for 150,000 pounds.

I have California Prune and Apricot Association contract dated September 2nd, 210,000 pounds.

I have a contract from Mayfair Packing Corporation dated September 14th, total 100,000 pounds.

What was the termination date that you had indicated, Mr. O'Connor?

Q. September 20th.

A. Well, that is the last contract prior to September 20th.

Q. All right.

A. And that includes regular kernels and some steamed kernels, as you know from the case of Sewell Brown. Those are [157] the facts as I have them summarized here.

Q. What was the highest price you paid for any of the apricot kernels on order or delivery that you have just referred to?

A. 18 cents for regular apricot kernels.

Q. And that was between August 26 and September 14th?

A. That is correct.

Q. And then I believe the record shows that you entered into a contract with Rosenberg Bros. on September——

A. September 23rd, I believe.

Q. September 23rd for 28 cents a pound?

A. That is correct.

Q. You came to California when you heard of the fire at Sewell Brown and Company; is that

(Testimony of Jack M. Kaplan.)

correct?

A. That is correct.

Q. And the reason is because Sewell Brown and Company had some of your orders; they had 385,000 pounds, did they?

A. That is part of the reason. I wanted to determine what was happening with that contract, and I wanted to determine the possibility of making additional purchases because I had not covered for my requirements for the balance of the crop year.

Q. By the way, in the year 1954, what variance was there in the price of apricot kernels on the market?

A. I would say I couldn't tell you unless I checked the records. [158]

Q. What is your best recollection?

A. I must honestly say I have no real recollection of the price. These prices fluctuate rapidly, and from one year to the next there is such a variation that I would have to resort to the records before I could answer intelligently.

Q. Do you know what the variance in price was of regular apricot kernels during the year 1953?

A. I couldn't say unless I checked the records.

Q. Well, in 1954 was the variance 10 cents, 12 cents, or was it 5 cents or 2 cents?

A. I have answered that, Mr. O'Connor. I just don't know unless I look at the records. I wouldn't want to venture a wild guess and I would have to look at the records.

Q. As a matter of fact, during the year 1954,

(Testimony of Jack M. Kaplan.)

Mr. Kaplan, there wasn't a variance of more than 2 cents during the entire season for the price of regular apricot kernels, was there?

A. That may very well be; I couldn't say until I looked at the records.

Q. Do you know what the highest price was for apricot kernels during the year 1954?

A. I could get my records and answer right from them, if you are interested.

Q. Isn't it a fact that 19 $\frac{1}{4}$ cents a pound was the highest [159] price for regular apricot kernels?

A. I have no way of answering that question. I submit that I can get my records and read from my records, and I offer to do so.

Mr. Eisner: Are your records here, Mr. Kaplan?

The Witness: No, they are not, not for those years, but I can have them sent airmail or get the information given to me over the phone, or have them telegraphed.

The Court: What relation has the price of '53, '54 and '55 with relation to our problem?

Mr. O'Connor: It has this relationship, if the Court pleases——

The Court: Did they have two fires in that season?

Mr. O'Connor: No, no. It is a question at the time of the contract what hazards the person is contracting with reference to in the normal course of things, or what variance in prices they could be chargeable with.

The Court: Well, but the prices fluctuate from

(Testimony of Jack M. Kaplan.)

year to year, depending upon conditions existing at that time in relation to crop.

Mr. O'Connor: Yes.

The Court: In the period we are dealing with they had two fires. I don't know what bearing this testimony has upon the merits of this case.

Mr. O'Connor: It has this, your Honor: On the question [160] of what are the risks that the parties taken when they enter into a contract at a specified time for any specified price for certain merchandise.

If the merchandise has a record of non-fluctuation or small fluctuation, then it is one risk. If it is a risk commodity, then they contract with knowledge or notice of the risk involved and the price of that particular commodity and the variance or fluctuation of the price.

Mr. Eisner: That is a new principle of law that I never heard of before.

Mr. O'Connor: Well——

Mr. Eisner: Just a moment. We will make the objection in the interests of time——

Mr. O'Connor: I didn't speak to the Court idly, counsel; I will cite cases.

Mr. Eisner: We make the objection that this line of testimony is irrelevant, incompetent and immaterial, and not proper cross-examination.

The Court: I will allow the greatest latitude so the truth may appear lest I do violence to the law in that particular. That is the reason I call counsel's attention to the fact that the price varies from

(Testimony of Jack M. Kaplan.)

year to year, depending upon conditions, whether there are fires or what not. So we are dealing with this period here under the contract.

Mr. O'Connor: Yes, we are, but the cases will hold, if [161] the Court please, that the parties contract having in mind the usual variances or fluctuations of price levels of products that they are dealing with.

The Court: All right. Let us proceed.

Q. (By Mr. O'Connor): Mr. Kaplan, the Sewell Brown fire destroyed all of the poundage that you had ordered; is that correct?

A. That is not so.

Q. How much was destroyed?

A. I can answer authoritatively that I had three contracts; in each case some portion of the poundage involved was affected by the fire as to loss in the fire. I had one contract dated prior to the fire with California Packing Corporation where no poundage was involved in the fire, and I had full delivery, and these other three cases, eliminating Sternau for the moment—in these other three cases, Sewell Brown was directly involved in the fire; California Prune and Apricot Association had their kernels at the Sewell Brown plant and they were involved in the fire to some extent. Some of them were not delivered.

Mayfair Packing had some of their kernels delivered to the Sewell Brown plant, and some of those were involved in the fire, and I received partial deliveries on each of these contracts, because

(Testimony of Jack M. Kaplan.)

it is a well known principle and it is stipulated in many of these contracts there is a force majeure [162] clause, which indicates—and I am not quoting it, but as I understand it—that in the event of fire that the seller has a right to apportion his total holdings at the date of the fire—apportion his total holdings prior to the fire and the undamaged portion subsequent to the fire and pro rata make distribution to each buyer accordingly.

And on that basis I received pro rata deliveries from each of these three I mentioned, Sewell Brown, Prune and Apricot, and Mayfair Packing.

Q. All right. The Sewell Brown fire and the consequent destruction of a considerable amount of tonnage of regular apricot kernels resulted in a shortage of supply, causing the market price of kernels to go up, did it not?

A. It did.

Q. Did you make a test of the two 100-pound sample bags of kernels that were shipped to you on or about August 31st by Sunset-Sternau?

A. I made a sample test of one bag and retained one as a retaining sample, expecting delivery, for quality.

Q. Did you make a test with reference to the weight of broken kernels in the bag?

A. We did not. We made no test other than a superficial examination, and we could very readily see, after many, many years' experience with this product, an excessive amount of broken kernels. And I would say, as I have previously said—I [163]

(Testimony of Jack M. Kaplan.)

examined this material personally upon arrival; I would say that my best estimate of the percentage of broken kernels contained in those two bags ran about seven or eight per cent broken.

Now, that was an estimate based upon a superficial examination without weighing.

Q. Is that a normally excessive amount of broken kernels?

A. There is no such a thing as a normal excess. Normal is within five per cent; anything above five per cent is not normal. I have never seen prior to this occasion, in a regular apricot kernel delivery.

Q. Prior to this occasion you had never seen apricot kernels in the excess of five per cent broken?

A. Not in the regular apricot kernels—so labeled bag of apricot kernels.

Q. Well, did you tell Mr. Frank Sullivan of Prince-Keller and Company on or about September 8th, that you found the apricot kernels involved were satisfactory with one exception, the broken kernels far exceeded the normal tolerance?

A. I told Mr. Sullivan that there was a normal tolerance understood in the trade of five per cent broken maximum. I told him that the type sample I received had in excess of five per cent broken; that there was a normal requirement, express or implied, but it was normal either way—a regular custom in the trade, where regular kernels were not to contain more than five per cent broken, and I indicated that in some cases [164] we have con-

(Testimony of Jack M. Kaplan.)

tracts where they do not show the five per cent expressly stipulated, and some do. I have one here from M. J. Bond Company, where there is no five per cent clause. I have another from Prune and Apricot where there is no five per cent quoted. I have one from Mayfair where the broker's confirmation shows five per cent, and the confirmation more formally executed contract does not show the five.

Some do, some do not. It is flexible, but they are all expressly understood not to have more than five per cent, whether it is said, or whether it is not.

The Court: We will take an adjournment until 10:00 o'clock tomorrow morning.

(Thereupon an adjournment was had until Tuesday, February 26, 1957, at 10:00 o'clock a.m.) [165]

Tuesday, February 26, 1957—10:00 O'clock A.M.

JACK M. KAPLAN

resumed the stand, having been previously duly sworn, and testified further as follows:

Further Cross Examination

The Clerk: Jack M. Kaplan to the stand, heretofore sworn.

Q. (By Mr. O'Connor): Now, Mr. Kaplan, in your testimony yesterday I believe you stated that at the time of the Sewell Brown fire in Los Gatos that you had certain orders for kernels and that a

(Testimony of Jack M. Kaplan.)

part of those orders or the supplies were at Sewell Brown's plant in Los Gatos; that is correct, is it?

A. That is correct.

Q. And as I recall your testimony, you had 385,000 pounds bought on order from Sewell Brown, which included regular and steamed kernels; that is correct, is it not?

A. That is correct.

Q. And did you also—my notes do show that California Packing had some of their kernels down there; is that correct?

A. Your notes are not correct. I assume that you are implying there that California Packing had kernels involved in the location of the fire. Is that what you are implying?

Q. Yes.

A. That is not correct.

Q. Did any other firm, such as Mayfair, that you had an [166] order for a 100,000 pounds of kernels—did they have any of their kernels there?

Mr. Eisner: It is understood, if the Court please, that this line of examination pertaining to other contracts is objected to as irrelevant and immaterial and not proper cross examination. I made the objection before.

Mr. O'Connor: The purpose of this is just to—and this is the last series of questions I have on this subject, your Honor—is to establish the number of pounds of kernels that he had on order that were located at the scene of the fire of Sewell Brown in Los Gatos.

(Testimony of Jack M. Kaplan.)

The Court: What relation has that to the issues involved here?

Mr. O'Connor: I then want to determine how much—the witness testified yesterday, without testifying to the amount, that he received from these orders certain amounts by reason of prorations.

I want to determine how much he received back by way of prorations.

Mr. Eisner: I can see no relevancy or pertinency, if the Court please.

The Court: You certainly will be sustained.

Q. (By Mr. O'Connor): Mr. Kaplan, how many pounds of kernels did you buy after September 21st? A. After September 21st? [167]

Q. Yes.

A. Well, again, rather than give you the grand total, I will give you the individual contracts that I have. We can add that up.

I have one contract, September 23, 1955, with Rosenberg's which has been submitted as another exhibit. This contract—I shall give you these figures in pounds so that they are all consistent.

Q. Yes.

A. This contract had 350,000 pounds of regular kernels and in addition 350,000 pounds of steamed kernels.

I had a subsequent contract dated November 7th, same year, with California Packing, which was for 60,000 pounds of regular kernels.

I had—well, this is January 16, 1956. I don't

(Testimony of Jack M. Kaplan.)

know if you want to go into 1956, but that is my next contract.

Q. I want to confine it to 1955.

A. That is the last contract.

Q. Those are the last contracts. Now, Mr. Kaplan, I will show you the bought note which forms Plaintiff's Exhibit No. 8.

A. I have a copy of it.

Q. I think you have a copy of it there in your file, do you not?

A. Right. I just wanted to get it, Mr. O'Connor, so that [168] I have it handy right here. Yes.

Q. You were familiar with the terms of that particular bought note; it is the usual type of bought note used in New York City, is it not?

A. It is.

Q. And I call your attention, Mr. Kaplan, to the fact that in the last line of the fine print at the bottom of that contract appears the word "arbitration." A. Correct.

Q. Under the head note "Arbitration" appears the following language:

"Any controversy or claim arising out of or relating to this contract shall be arbitrated before the Association of Food Distributors, Inc., of New York City—this memorandum shall be subordinate to a more formal contract if and when such contract is executed. In the absence of such contract, this memo represents the contract of the parties.—Seller agrees to conform to National Pure Food Laws."

(Testimony of Jack M. Kaplan.)

A. That's right.

Q. Mr. Kaplan, did you at any time, prior to commencing this action, commence or initiate arbitration proceedings before the Association of Food Distributors, Inc., of New York City?

Mr. Eisner: That is objected to as incompetent, [169] irrelevant and immaterial, not proper cross examination. We are here before a court trying the issues in this case. The defendant has filed an answer meeting the issues in this case, trying it, and we cannot raise a question whether or not there was an arbitration. The defendant in the action or any party to the action cannot try the case before a court of law, speculate upon the decisions of the issues, and then raise the question about arbitration, if the Court please.

Furthermore, counsel has denied and is denying the existence of the contract, and when the existence of the contract itself is put into issue, the arbitrators cannot try such an issue involving the very existence of the contract.

If a controversy arises under a contract, the arbitrators can try the issue. But that is entirely beside the point here. There is no defense; there is no issue; there was no offer of the defendant to arbitrate. The issue of the case is tried before a court of law, and it is altogether out of order to raise any question of arbitration.

Mr. O'Connor: May it please the Court, in the present case the complaint recites the existence of

(Testimony of Jack M. Kaplan.)

a written contract dated September 8th. Until Mr. Kaplan, representing the plaintiff in this action, took the stand and testified under cross examination that this was the contract that he referred to in his pleadings, that this was the contract he was relying upon, it was not determined exactly what was the written contract. [170]

Now he has testified that this is the written contract, and having so testified, then if that contract contains a condition precedent to suit, that condition must be met.

This contract contains a definite provision for arbitration, and I respectfully submit to the Court that if this is the contract the plaintiff relies upon, then the plaintiff must show a performance under the terms of the contract.

The Court: How could there be an arbitration there in the light of the testimony in this record?

Mr. O'Connor: If the Court pleases, under the terms of this contract, there could be a commencement of arbitration. There could be a refusal by the defendant to recognize the contract so far as the arbitration was concerned; the arbitrators could hear the evidence, fix either liability or non-liability, and then suit follow, and that is the ordinary and proper course to pursue.

The Court: What could have been done is beside the issue here. Keep in mind this record. How could there be an arbitration of the conduct of the parties on both sides?

Mr. O'Connor: Well, if this plaintiff insists that

(Testimony of Jack M. Kaplan.)

this is the contract, then he is bound by the terms of the contract he asserts.

The Court: In the interests of time I will allow it to go in subject to a motion to strike over your objection. [171]

Mr. O'Connor: May I proceed?

The Court: Reframe your question.

Q. (By Mr. O'Connor): Mr. Kaplan, did you or any member of the firm of American Almond Company, the plaintiff in this action, prior to the filing of this action, commence or initiate any arbitration proceedings before the Association of Food Distributors, Inc., of New York City?

A. No, sir. I have a reason, your Honor——

Q. No.

The Witness: I would like to submit the reason for not doing so.

The Court: You may explain your answer if you wish.

The Witness: We have an attorney representing us in New York City with whom I discussed this matter. This attorney advised me—and by the way, the attorney was the general counsel of the New York Food Distributors Association which runs these arbitrations now being discussed, whom I consulted on this matter.

Mr. O'Connor: If the Court please——

The Witness: Alexander Blank.

Mr. O'Connor: I will submit that the answer of this witness is completely hearsay and not binding upon this defendant.

(Testimony of Jack M. Kaplan.)

Q. (By the Court): On the advice of counsel you did what?

A. He advised me——

The Court: Not what he advised you. [172]

The Witness: I am sorry.

The Court: As a result of his advice——

The Witness: As a result of this advice, I refrained from making any initial act to bring this to arbitration in New York City.

Mr. O'Connor: I will move that the answer be stricken as completely hearsay.

The Court: What is hearsay?

Mr. O'Connor: The statement that he did so on the advice of an attorney and testifying as to the conversations he had with the attorney.

The Court: I will allow the record to stand.

Q. (By Mr. O'Connor): Now, Mr. Kaplan, you were aware, were you not that prior to the dealings in these kernels, and during the time that the dealings were progressing in the kernels, that Prince-Keeler used a different type of contract than the one that is identified as Plaintiff's Exhibit 8 in connection with confirming or indicating sales insofar as Sunset-Sternau Food Company was concerned, were you not?

Mr. Eisner: That is objected to as irrelevant, incompetent and immaterial, not proper cross examination. Counsel is apparently referring—he has handed me a transaction in an entirely different commodity, almonds, and whatever procedure was

(Testimony of Jack M. Kaplan.)

followed in that is entirely irrelevant, incompetent and immaterial. [173]

The Court: Submitted?

Mr. O'Connor: Yes, your Honor.

The Court: The objection will be sustained.

Mr. O'Connor: Well, then I offer to prove, by the introduction of these documents, if the Court please, in connection with certain other documents which are on file, that Prince-Keeler and Company, Inc., the brokers who represented both parties to this particular transaction, were specifically instructed by the defendant in this case prior—a long time prior to the negotiations in this case that they were not to use the ordinary bought and sold note being used in New York City and which is in evidence as Plaintiff's Exhibit No. 8; that the defendants would not and did not agree to such type of bought and sold note, and wanted a mere memorandum of sale; and that special memorandums of sale were printed for the purpose of recording any buying and selling on behalf of the defendants; and that at all times Prince-Keeler and Company knew—and this defendant knew—that all orders were subject to written confirmation from Sunset-Sternau on their own contract—their own contract form.

And I have here a form of seller's note, one which represents a transaction with the American Almond Products Company, under date of October 14, 1954, the contract itself being in evidence in this case, your Honor, and another memorandum

(Testimony of Jack M. Kaplan.)

or note of the same type, bearing date October 13, 1955, showing the particular type of memorandum of sale. [174]

The Court: Of what?

Mr. O'Connor: Well, in this case, for any of the products—they were to be used in any products of Sunset-Sternau Company by Prince-Keeler and Company of New York, the brokers in this case; and the notes in questions were the ones ordinarily used by Prince-Keeler and the only ones they were authorized to use, in any event; they were not authorized to use the note which was used in this particular case, namely, Plaintiff's Exhibit No. 8, part of which I have just quoted, insofar as the arbitration clause is concerned.

I offer to prove these facts and to introduce these memorandums or sellers' notes into evidence at this time in support of the defendant's case.

Mr. Eisner: That would be entirely irrelevant and immaterial, if the Court please. Any instructions or any transactions between the defendant and his broker unknown to the plaintiff in this action would be entirely irrelevant and immaterial.

Let us assume the defendant wanted the broker to use another form, and the broker used the customary form. The customary form was used in this instance. The sale was recognized. The record is just filled with documents in which the transaction was recognized, and the fact that in other transactions, if there were such—in almonds they may have used or wanted to use another form of bro-

(Testimony of Jack M. Kaplan.)

ker's memorandum— is [175] entirely irrelevant and immaterial to this case and not proper cross examination.

The Court: The objection will be sustained.

Mr. O'Connor: Very well. No further questions, your Honor.

The Court: Step down.

Mr. Eisner: I have just one question.

Redirect Examination

Q. (By Mr. Eisner): Mr. Kaplan, counsel asked you pertaining to transactions in apricot kernels in which the broker's memorandum was issued and was not followed by any formal contract. I am going to show you a document which was already indicated on your cross examination and ask you if that is such a broker's memorandum?

A. It is.

Mr. O'Connor: May I see that document, counsel, please?

(Document shown to counsel.)

Q. (By Mr. Eisner): This broker's bought note represents a purchase made by American Almond Products Company from Sewell Brown and Company? A. That is correct.

Q. Represents a purchase of 280,000 pounds of fancy regular California apricot kernels, and 105,000 pounds of regular Santa Clara steamed apricot kernels? A. That is correct. [176]

Q. And Mr. Kaplan, I call your attention to the fact that the exact language appears upon this

(Testimony of Jack M. Kaplan.)

bought note that appears upon the one that has been identified as the bought note in this case, in particular:

“This note shall be subordinate to more formal contract when and if such contract is executed. In the absence of such contract, this note represents the contract of the parties.”

I will ask you: Was this memorandum followed by any other contract of any character?

A. No, sir, it was not. And it is the policy of Sewell Brown never to follow with a more formal contract, but merely to rely upon this memorandum as the contract between the parties.

Q. I notice——

Mr. O'Connor: Just a minute. I will move to strike that answer as not responsive to the question, and on the further ground that it is incompetent, immaterial and irrelevant, so far as the issues of this case are concerned. We have a specific deal upon which they are suing here; we have the deal between Sunset and the plaintiff.

The Court: The objection will be overruled. Let the question and answer stand.

Q. (By Mr. Eisner): Mr. Kaplan, I also notice in this contract that this is one in which there is no mention made [177] of the tolerance of five per cent broken; is that true?

A. That is true.

Mr. Eisner: We offer this broker's memorandum in evidence as plaintiff's next exhibit.

The Court: Let it be admitted next in evidence.

(Testimony of Jack M. Kaplan.)

Mr. O'Connor: My objection goes to the introduction of that document.

The Court: Let the record so show. The objection will be overruled.

The Clerk: Plaintiff's Exhibit 44 admitted and filed in evidence.

(The document referred to was marked Plaintiff's Exhibit No. 44 in evidence.)

Q. (By Mr. Eisner): I show you a contract also made in 1955, Mr. Kaplan, and ask you what this is.

Mr. O'Connor: May I see those documents, counsel? If you have them here I can look them over. Oh, you have them altogether here.

(Documents shown to counsel.)

Q. (By Mr. Eisner): What does that represent?

A. This represents a broker's memorandum, which is a bought note, for my purchase of a 100,000 pounds of apricot kernels from Mayfair Packing Company, dated September 14, 1955. Attached to it is the more formal contract referring to the same transaction between Mayfair Packing and my firm. [178]

Q. And this contract is also one for regular apricot kernels? A. It is.

Q. And I call your attention to the fact that there is nothing mentioned in this contract from Mayfair Packing Company pertaining to the five per cent tolerance. A. That is correct.

Q. And that was implied?

(Testimony of Jack M. Kaplan.)

A. That is correct.

Mr. O'Connor: I move to strike the answer, if the Court pleases, as the conclusion of the witness.

The Court: Identify it.

The Witness: It is under the terms of the contract, I might answer your Honor, that that calls for—on the reverse side of the formal contract it calls for a Dried Fruit certificate, and a Dried Fruit certificate of quality prior to shipment would obviously indicate not in excess of five per cent broken—not to exceed five per cent.

The Court: That document will speak for itself.

Mr. Eisner: We offer this document in evidence as Plaintiff's Exhibit next in order.

The Clerk: Plaintiff's Exhibit 45.

(The document referred to was marked Plaintiff's Exhibit No. 45 in evidence.)

Q. (By Mr. Eisner): Now, Mr. Kaplan, I show you this document and ask you what that is. [179]

A. That is a broker's memorandum confirming a sale to our firm from California Prune and Apricot Association of 210,000 pounds of apricot kernels, dated September 2, 1955.

Q. I show you this document and ask you what that is.

A. This is the more formal contract between the parties referring to the same transaction.

Mr. Eisner: We offer these two documents in evidence as Plaintiff's Exhibit next in order.

The Court: Let them be admitted and marked, next in order.

(Testimony of Jack M. Kaplan.)

Mr. O'Connor: Same objection to the introduction.

The Court: The objection will be overruled.

(The documents above referred to were marked Plaintiff's Exhibit No. 46 in evidence.)

Mr. Eisner: I call the Court's attention to the fact that the broker's memorandum says "Not to exceed five per cent by weight broken," and nothing is said in the formal contract. It is either express or it is implied.

Q. Mr. Kaplan, counsel asked you the particulars in which the letter of September 8, 1955, written by Prince-Keeler and Company to Sunset-Sternau Food Company, was not accurate. I will ask you to tell in what respects the letter was not accurate.

A. Well, I quote from the letter—I have a photostat here. I think it is the third paragraph, after quoting the five per cent clause, where the next sentence—— [180]

The Court: Read the whole letter.

The Witness: The entire letter, your Honor?

The Court: Yes.

The Witness: This is a letter from Frank Sullivan of Prince-Keeler addressed to Sunset-Sternau Food Company:

"Gentlemen:

"Mr. Kaplan of American Almond Products Company, Incorporated, phoned today that the two 100-pound bags of apricot kernels were received and found satisfactory with one exception, that the

(Testimony of Jack M. Kaplan.)

broken kernels far exceeded the normal tolerance.

“We advised him that we were mailing your formal contract numbered 2013, received today. However, during the discussion he advised that he had overlooked the following standard clause: ‘Merchandise not to exceed five per cent by weight of broken kernels,’ and requested that we add this on our contracts and return yours for the same addition.

“He advised that all his regular suppliers, that is, Calpak and Rosenberg, insert that clause, which is a recognized condition of sale of this particular item.

“It was not brought up before because he assumed it would be included as a matter of course in your contract. [181] We are therefore returning your contract No. 2023 as an enclosure and will appreciate your authorizing the addition of the above clause in compliance with the buyer’s request.

“Awaiting your further advice in this matter,

“Yours very truly, Prince-Keeler, signed Frank L. Sullivan.”

Now, there is the following objection on my part, particularly the sentence beginning “He advises”—referring to Mr. Kaplan—“He advises that all his regular suppliers, that is, Calpak, Rosenberg, insert this clause, which is a recognized condition of sale for this particular item.”

As I have previously testified, I think more than once, I said to Frank Sullivan that this is a recog-

(Testimony of Jack M. Kaplan.)

nized condition of sale of this particular item, but it may or may not be specifically expressed in a contract; that it was a flexible procedure, but that some do include it and some do not. Where it was not specified, it was implied in the custom of the trade.

And I further said that in view of the fact this was my first transaction with Sunset-Sternau, I would prefer that he be put on notice and specifically insert all the implied warranties. That is my major objection to this letter.

There may be one or two negligible things, such as—I will mention them—"The broken kernels far exceeded the normal tolerance." [182]

I never said that they far exceeded the normal tolerance. To me this point was insignificant. They simply exceeded the tolerance and I requested that they be specifically within the five per cent. That was my objection to this letter.

Mr. Eisner: That is all, Mr. Kaplan.

Recross Examination

Q. (By Mr. O'Connor): Mr. Kaplan, did you ever make any objection in writing to the contents of that letter of September 8th from Prince-Keeler, which is, I believe, Plaintiff's Exhibit No. 10?

A. No, I did not.

Q. Did you ever at any time advise Prince-Keeler that the contents and statements contained in that letter were incorrect?

A. No, I did not.

(Testimony of Jack M. Kaplan.)

Q. Did you at any time advise Sunset-Sternau, the defendant in this case, that the contents of that letter were incorrect?

A. Wait a moment. Because I had many conversations with Mr. Sternau and I want to reflect on that.

There was a discussion, as I have previously testified, a telephone conversation in September, where you put the question to me, did I waive the five per cent broken clause. We had some discussions on that, and I am trying to recall as to whether we had any discussions with reference this matter other than what I have already indicated. [183]

Well, I can say that in this conversation with Mr. Sternau, as I have previously testified, I had no problem in my mind but that I would be able to get either California Packing Corporation or Rosenberg to do this, and I indicated that if they did the crack out, there would obviously be no difficulty, and I wasn't concerned about any problem in excess of five per cent unless I could not get either one of these firms to do it, and in that case, if we had to rely on some other third unknown party—and I never requested Mr. Sternau to inform me as to who this third unknown party was; I couldn't imagine, but I don't know every nook and cranny in California; conceivably there might have been someone—in this case, I said to Mr. Sternau, "If such should be the case and you would need a waiving of the excess of five per cent, in that case I would agree to it."

(Testimony of Jack M. Kaplan.)

That is as far as I discussed it.

Q. (By Mr. O'Connor): You never waived that in writing in any of your communications with Sunset?

Mr. Eisner: That has already been gone into, if the Court please.

The Court: He answered that he did not.

The Witness: I did not.

Mr. O'Connor: No further questions.

The Court: Step down.

Mr. Eisner: The plaintiff rests, if the Court please.

Mr. O'Connor: Mr. Sternau, will you take the stand, please. [184]

SIDNEY STERNAU

called as a witness on behalf of defendant, being first duly sworn, testified as follows:

The Court: Your full name please?

A. Sidney Sternau.

The Court: Where do you live?

A. 502 College Avenue, Modesto, California.

The Court: What is your business or occupation?

A. President of Sunset-Sternau Food Company.

The Court: Take the witness.

Direct Examination

Q. (By Mr. O'Connor): Mr. Sternau, you are the President of the defendant corporation in this case, are you? A. Yes, sir.

(Testimony of Sidney Sternau.)

Q. And did you in the month of July have occasion to visit the plaintiff, and specifically Mr. Kaplan at their plant in Brooklyn, New York?

A. Yes.

Q. And you were in company with Mr. Astrack of Prince, Keeler at that time? A. Yes.

Q. And you had with you, did you not, a sample of regular kernels—apricot kernels?

A. I did. [185]

Q. And did you show those to Mr. Kaplan?

A. I did.

Q. For the purpose of trying to make a sale, or what was your purpose?

A. For the purpose of trying to make a sale.

Q. Was there any discussion about apricot kernels with Mr. Kaplan at that time and the position of you and your company with reference to that product?

A. The only discussion was on price; that we would be competitive.

Q. Was there any discussion there at the time as to whether or not this was the first time that you were in that business?

Mr. Eisner: Just a moment. We object to that as leading and suggestive, if the Court please. Counsel has asked for a conversation; the witness has answered. That is the only way——

The Court: Fix the time, place and persons present and develop the conversation whatever it is.

Mr. O'Connor: I think we have established Mr.

(Testimony of Sidney Sternau.)

Astrack was present; Mr. Kaplan was present; is that correct? A. Yes.

Q. (By the Court): And when was this?

A. That was in July.

Q. (By Mr. O'Connor): What date.

A. Around the 15th or 17th of July; I am not positive. [186]

Q. (By the Court): And where was this?

A. In New York City—in Brooklyn.

Q. (By the Court): Who was present?

A. Mr. Kaplan, Mr. Astrack and myself.

Q. (By the Court): In the morning or afternoon?

A. I believe it was in the morning.

The Court: Take the witness.

Q. (By Mr. O'Connor): What conversation was there relative to the apricot kernels at that time? What was said by you and what was said by Kaplan?

A. I told him that we were absolutely new in the business, we didn't know much about it, and Mr. Kaplan agreed he wanted to help us——

Mr. Eisner: A little louder; I can't hear.

Mr. O'Connor: Speak louder, Mr. Sternau.

A. I said we told Mr. Kaplan we were new in the business; it was the first offer we ever made, and he wanted to assist a new packer.

Mr. Eisner: What was that last?

A. He wanted to assist a new packer.

The Court: He wanted to assist a new packer.

(Testimony of Sidney Sternau.)

Mr. O'Connor: Mr. Sternau has a slight impediment of speech which makes it a little difficult.

The Court: Raise your voice.

The Witness: Yes. [187]

The Court: The reporter has to take this down.

Q. (By Mr. O'Connor): Mr. Sternau, did you, after leaving the offices of the plaintiff that day, did you subsequently receive any communications so far as sale to them of regular apricot kernels?

A. No.

Mr. Eisner: Received any communication from whom, Counsel?

Mr. O'Connor: From either American Almond Company or from Prince, Keeler and Company in New York.

A. I don't remember receiving any communication.

Q. You subsequently did receive, though, a communication from Prince, Keeler advising that American Almond wished to buy seventy five tons of regular apricot kernels? A. Yes.

Q. That is correct, is it not? A. Yes.

Mr. Eisner: Just a moment please. Well——

Q. (By Mr. O'Connor): Did you thereafter send or cause to be sent to American Almond Company two one hundred pound bags of regular apricot kernels as samples? A. Yes.

Q. And did you hear from either American Almond Company or from Prince, Keeler the results of their testing of the samples?

A. Yes, we did. [188]

(Testimony of Sidney Sternau.)

Q. I will show you a letter, which is plaintiff's Exhibit No. 10 in evidence, and ask you if that is the communication you received relative to their test of the two sample bags. A. Yes.

Q. And that letter recites the fact, does it not—I'm trying to summarize this so as not to read the entire letter, your Honor—it recites the fact that the quality of the sample was approved but that the sample far exceeded the normal tolerance of five per cent by weight of broken kernels, does it not? A. Yes.

Q. You received that communication on the eighth? A. Yes.

Q. Or it is dated the eighth. You received it in the regular course of mail, I assume. A. Yes.

Q. Mr. Sternau, had you previously received from Prince, Keeler under date of September 1, 1955, at your plant in Modesto what has been referred to here as a bought note and which is plaintiff's Exhibit No. 8. A. Yes.

Q. And upon receipt of that bought note, what did you, or when I speak of you, your firm, do?

A. Mailed a formal contract to Prince, Keeler for signature.

Q. Mr. Sternau, at any time prior to September 1st or [189] September 8th, 1950, had you or your firm authorized Prince, Keeler in writing to bind your firm to any contract? A. Never.

Mr. Eisner: Just a moment. That is objected to as calling for the conclusion of the witness. The documents will speak for themselves.

(Testimony of Sidney Sternau.)

The Court: Objection sustained.

Mr. O'Connor: If the Court please, I have no way of proving the existence or non-existence of a document. There is no such document in existence.

The Court: It would clearly call for the opinion and conclusion of this witness. The Court has ruled.

Mr. O'Connor: I will make an offer of proof at this time, to prove through this witness, if the Court please, that there never had been executed by the defendant company any authority in writing to Prince, Keeler and Company, brokers, in New York City, to bind the defendant company to any contract.

Mr. Eisner: That is objected to——

Mr. O'Conner: That is the only purpose of the question.

Mr. Eisner: That is objected to as calling for the conclusion of this witness. The documents will speak for themselves.

The Court: The Court has ruled. The objection will be sustained. [190]

Q. (By Mr. O'Connor): What did your firm do, upon the receipt of this document entitled plaintiff's Exhibit No. 8?

A. We mailed a formal contract.

Q. And I will show you a document which has been introduced in evidence as plaintiff's Exhibit No. 9 and ask if that represents—bearing in mind this is a photostat—does that represent the contract which was sent by your firm to Prince, Keeler?

A. Yes, sir.

(Testimony of Sidney Sternau.)

Q. And the date of this document is September 6th? A. Yes.

Q. That is correct, is it not? A. Correct.

The Court: That is exhibit what, for the record?

Mr. O'Connor: Exhibit Number 9, your Honor.

Q. In the letter of September 8th, 1955 from Prince, Keeler and Company, which is plaintiff's Exhibit No. 10, they returned your formal contract to you, did they not? A. Yes.

Q. And they requested that you add a clause to that contract as follows:

"The merchandise not to exceed five per cent by weight of broken kernels"; is that correct?

A. Yes, sir.

Q. Did you, the defendant, your firm, include that in a [191] contract and return it to Prince, Keeler and Company? A. No, sir.

Q. Why not?

A. Because we were not able to comply with that; Mr. Bonzi informed us.

Q. Did you after receipt of this letter of September 8th attempt to determine whether you could comply with the five per cent clause referred to?

A. Yes, sir.

Q. And what did you do to determine whether or not you could comply with that clause?

Mr. Fisner: That is objected to as irrelevant, incompetent and immaterial, if the Court please, what efforts the witness may have made to see whether or not he could comply with that clause.

(Testimony of Sidney Sternau.)

If the clause exists it was his duty. If he sold to comply with it.

Mr. O'Connor: Now wait a minute. We have a sale by sample here, if the Court please. We have a sample and the report on the sample from the broker says that it far exceeded—and I quote the language of the letter which is in evidence:

“Far exceeded the normal tolerance.”

The Court: I will allow it subject to a motion to strike.

Mr. O'Connor: Would you read the question back, Mr. Reporter? [192]

(The reporter read the question.)

A. We contacted Mr. Bonzi after several weeks of trying to find him, and he informed us we could not comply with this clause.

Q. Who was Mr. Bonzi?

A. Mr. Bonzi was the man, the party, we were selling the apricot kernels for.

Q. That Sunset Sternau was selling them for?

A. Yes.

Q. And he advised you that he could not supply a product any better than the sample?

A. Yes, sir.

Q. Did you so inform Prince, Keeler and Company? A. Yes, sir.

Q. I show you a letter dated September 21, 1955, which is plaintiff's Exhibit No. 11, and ask you if you wrote that letter. A. Yes.

Q. Will you read the letter, please?

(Testimony of Sidney Sternau.)

Mr. Eisner: The letter speaks for itself, if the Court please.

The Court: I will allow him to read it.

A. "Dear Bill: We just had the packer in the office who is going to shell the apricot kernels and he advised me [193] that he could not guarantee five per cent pieces; that they cannot do any better than the sample. He is having a very difficult time in shelling these and would like to get out of the contract this season"——

Mr. Eisner: "This contract"——

The Witness: ——"this contract this season.

"Please advise if you are able to do it. It will be a personal favor if it is possible to assist this man setting up his plant the right way. Please advise us by Monday about this."

Q. (By the Court): What is the date of that?

A. The date of that is September 21st.

Mr. O'Connor: September 21st, your Honor.

The Witness: September 21st.

Q. (By Mr. O'Connor): At the time you wrote this letter, Mr. Sternau, did you know whether or not there had been a fire at the plant of Sewell Brown and Company in Los Gatos?

A. No I did not.

The Court: What was the date of the fire again?

Mr. O'Connor: September 20th, the day before.

The Court: And this?

Mr. O'Connor: September 21st.

Q. Mr. Sternau, did you subsequently and on or about between the 22nd and 24th of September re-

(Testimony of Sidney Sternau.)

ceive any telephone calls from Mr. Kaplan? [194]

A. Yes, I believe I did.

Q. Did you have any recollection or independent recollection of that conversation?

A. No, I don't remember; it is too long ago and we were too busy.

Q. Can you tell me, Mr. Sternau, did you make notes by the way of that conversation?

A. No, I did not.

Mr. Eisner: Counsel I didn't quite get the question.

Mr. O'Connor: He said no.

Mr. Eisner: This pertains to the conversation in September?

Mr. O'Connor: In September, yes.

Q. You don't have any independent recollection of that conversation?

A. Not any recollection; it is too long ago. They recalled and brought to my attention I had this conversation. I might have, but I don't remember. During that month business is very fast in our affairs and they go by.

Q. Now, Mr. Sternau, after you wrote this letter of September 21st did you at any time receive from Mr. Kaplan, or from the plaintiff in this case, either verbally or in writing, any written waiver of the five per cent by weight clause which they had insisted be in a written contract?

A. No, no, I don't remember receiving any verbal or written—— [195]

Q. In the conversations in November when Mr.

(Testimony of Sidney Sternau.)

Eisner was present with Mr. Kaplan and Mr. Bonzi in Modesto, did either Mr. Kaplan or Mr. Bonzi or Mr. Eisner at that time ever discuss with you the waiver of that condition? A. No.

Q. Was there any discussion during the conversations in November at Modesto relative to Sunset Sternau's liability to American Almond Company?

A. No, I don't think there was.

Mr. Eisner: May I suggest, Counsel, the proper way to ask that question if you want—

Mr. O'Connor: Do you want me to lay the foundation for it—persons present and so forth?

Mr. Eisner: I don't care about that. We know who was there. When you are asking about a conversation I would suggest that you ask for it and let the witness if he remembers state what took place.

Mr. O'Connor: In substance I have asked for that.

Q. What was said at those conversations, Mr. Sternau, relative any contract between Sunset Sternau and the plaintiff, American Almond Company in this case, if anything?

A. I think Mr. Eisner said that they had a contract with us, but they questioned Mr. Bonzi mostly. That was the morning in Mr. Price's office. Most of the conversation was between Mr. Eisner and Mr. Bonzi and with Mr. Price. We were [196] on the—we were just there, and in that conversation we told them we would do anything possible to cooperate with them; that we offered them

(Testimony of Sidney Sternau.)

our apricot kernels without any charge or anything the way the thing was set up.

Q. Mr. Sternau, after September 8, 1955, why didn't you send back to Prince, Keeler or to American Almond Company a contract containing the five per cent clause?

A. Because we were unable to comply with it; Mr. Bonzi couldn't shell them satisfactorily.

Q. In other words you couldn't meet that condition? A. We couldn't meet that.

Mr. Eisner: Just a moment, Counsel. I object to the question as leading.

Mr. O'Connor: Do you have an objection?

Mr. Eisner: I made the objection. You were summarizing.

Mr. O'Connor: No further questions.

The Court: We will take a recess.

(Short recess.)

Cross Examination

Q. (By Mr. Eisner): Now, Mr. Sternau, you testified to the business that you were engaged in, that of the Sunset Sternau Food Company. Has the Sunset Sternau Food Company ever engaged in the business of making paste from almond kernels—from apricot kernels?

A. I believe about ten years ago. [197]

Q. In other words, about ten years ago the Sunset Sternau Food Company engaged in the same line of business as the American Almond Products

(Testimony of Sidney Sternau.)

Company; that is of making paste from almond kernels; is that true?

A. Making paste from apricot kernels.

Q. From apricot kernels; excuse me. Is that true? A. Yes, sir.

Q. For how many years has the Sunset Sternau Food Company engaged in that business.

A. Oh, approximately about ten years.

Q. Ten years. During the time Mr. Sternau, had the Sunset Sternau Food Company made many purchases of apricot kernels?

A. Yes, I believe so.

Q. Have they made purchases of apricot kernels from the California Packing Corporation?

A. I couldn't tell you who; I didn't do the buying at that time. I am unable to answer your question.

Q. They purchased apricot kernels from firms that sold them; is that correct?

A. That is correct.

Q. And made these apricot kernels into paste?

A. That's correct.

Q. During that period of time over the ten years had the Sunset Sternau Food Company made many purchases of what were known as regular apricot kernels? [198]

A. I couldn't tell you if they were regular, irregular, steamed, or any way; I didn't do the buying.

Q. Whether you did the buying or not, how long have you been president of the company?

(Testimony of Sidney Sternau.)

A. I have only been president ten years.

Mr. O'Connor: Just a moment. If the Court please, I will submit that Counsel is now attempting to badger and abuse the witness. His question as to the familiarity with the business is material.

The Court: He is president of the business.

Mr. O'Connor: He is now.

The Court: He was at that time.

The Witness: No, sir.

Q. (By the Court): What was your position?

A. I was a salesman.

Q. (By Mr. Eisner): How long have you been connected with the Sunset Sternau Food Company?

A. All my life. I mean all my working—ever since I have been working.

Q. Well, just——

A. Since I got out of school.

Q. Well approximately how many years?

A. Approximately 35 or 40 years.

Q. And during at least ten years of that period the Sunset Sternau Food Company was engaged in the business of buying [199] apricot kernels and manufacturing them into paste, wasn't it?

A. Yes, sir.

Q. I am asking you if during that period the Sunset Sternau Food Company did not make numerous purchases of regular apricot kernels.

A. Probably did.

Q. I will ask you, Mr. Sternau, if in those purchases of regular apricot kernels the deliveries were not limited to five per cent of broken kernels?

(Testimony of Sidney Sternau.)

A. I do not know. I did not handle that business at all, the buying, sampling or any part of it, so I cannot answer your question.

Q. That is the best answer you can make to that question? A. Certainly.

Q. Now then, Mr. Sternau, when you received plaintiff's Exhibit 10, which is the letter dated September 8, 1955 in which Prince, Keeler and Company reported to you that Mr. Kaplan stated that it was the regular custom for the clause "merchandise not to exceed five per cent by weight of broken kernels" to be inserted in the contract, did you make any inquiry to ascertain whether or not that was the custom of the trade?

A. We contacted the man who was doing the shelling—we tried to contact him, and he told us he couldn't meet it.

Q. Now, just a moment. That isn't answering my question. [200]

Mr. O'Connor: Let the witness finish the answer, Counsel.

Mr. Eisner: I think he did finish the answer and it wasn't in response to the question.

The Court: Reframe the question.

Q. (By Mr. Eisner): I am asking you, Mr. Sternau, after receiving this letter of September 8, 1955 in which it is stated that there is this custom of the trade, I am asking you if you made any inquiry of anybody to ascertain whether that was the regular and established custom of the trade.

A. We contacted Mr. Bonzi who was doing the

(Testimony of Sidney Sternau.)

shelling, who told us he couldn't meet that requirement.

Q. Just a moment, Mr. Sternau. Would you kindly listen to the questions. I am not asking you what you contacted Mr. Bonzi and asked him if he he could meet; I am asking you if you made any inquiry of anybody to ascertain whether or not the statement in the letter of September 8, 1955, was an accurate statement: that it was the regular custom of the trade for a tolerance of five per cent of broken kernels to be the maximum that could be contained in a delivery of regular apricot kernels.

A. The only one I contacted was Mr. Bonzi who was going to do the shelling and who we were selling the kernels for.

Q. Just a moment, Mr. Sternau. You can answer this question yes or no. Did you make any inquiry to ascertain whether or not the statement in the letter of September 8, 1955, [201] was an accurate statement and that it was the regular custom of the trade for that tolerance to be included.

A. No, outside of Mr. Bonzi.

Q. Mr. Sternau, after you received the letter of September 8, 1955, you didn't make any reply to that letter of September 8, 1955, until September 21st, 1955, did you?

A. That is correct.

Q. That was the first reply that you made?

A. Yes.

Q. In other words, when you received the letter

(Testimony of Sidney Sternau.)

of September 8, 1955, you didn't make any reply to Prince, Keeler and say that that isn't the regular custom of the trade or anything of that character, did you? A. No, sir.

Q. And on September 21st, 1955, you then wrote plaintiff's Exhibit No. 11. A. Correct.

Q. And in which you stated that "we just had the packer in who was going to shell the apricot kernels and he advised me that he cannot guarantee five per cent pieces; that they cannot be any better than the sample. He is having a very difficult time in shelling these and would like to get out of this contract this season.

"Please advise us if you are able to do it. It will be a personal favor if it is possible to assist this man in [202] setting up his plant right away. Please advise me by Monday about this."

Q. Now, Mr. Sternau, when you refer to "the packer who was just in," with whom you had the conversation, are you referring to Mr. Bonzi?

A. Yes, sir.

Q. Now, Mr. Sternau, was Mr. Bonzi a packer?

A. Yes.

Q. Packed what?

A. He was going to crack these apricot kernels.

Q. A packer. Mr. Bonzi is in the business of buying refuse, isn't he?

A. He is, but he had a plant he was going to set up; he had the equipment; he was going to shell these kernels himself.

Q. Just a moment, Mr. Sternau. The business of

(Testimony of Sidney Sternau.)

Mr. Bonzi was buying refuse from canneries, was it not?

A. I believe he is in several businesses. We call him a packer; he is a trucker; he is a refuse, garbage hauler. He does a lot of things; he is a jack of all trade.

Q. Let me ask you, Mr. Sternau, on September 21, 1955, when you wrote this letter, did Mr. Bonzi have a cracking plant to crack apricot kernels?

A. He had the plant; he didn't have it set up. He had the equipment but he did not have it set up?

Q. Had he ever cracked apricot kernels? [203]

A. No, sir.

Q. Did he have any plant that was ever in operation? A. No, sir.

Q. Now you brought with you, you stated, when you went to New York some apricot kernels; is that correct? A. That is correct.

Q. How large a sample did you have?

A. Oh, it wasn't over a pound.

Q. Who cracked those kernels?

A. I couldn't tell you.

Q. Where did you get them?

A. I got them from Mr. Bonzi.

Q. You don't know how they were cracked?

A. No, I couldn't tell you where they were cracked or how they were cracked.

Q. Were there any broken kernels in that sample? A. I don't remember.

The Court: What was the date of that again?

(Testimony of Sidney Sternau.)

Mr. Eisner: That was in July of 1955 when he went to New York and he said he had a sample with him.

Q. Did Mr. Bonzi give you that sample before you left for New York? A. He did.

Q. Mr. Sternau, you received the request from the American Almond Products Company for a larger sample, didn't you? [204]

A. We did.

Q. Did Mr. Bonzi crack that sample?

A. No, he did not; the Continental Nut Company of Chico cracked that sample.

Q. The Continental Nut Company of Chico cracked the sample. So, so far as you know, had Mr. Bonzi ever cracked any apricot kernels in his entire experience?

A. I couldn't answer that question because I don't know.

Q. And then when you wrote the letter of September 21st, you referred to this packer, Bonzi, as having great difficulty in cracking these apricot kernels and reducing the percentage of broken kernels to less than five per cent; is that true?

A. That is correct.

Q. Now, Mr. Sternau, this letter of September 21, 1955, was written after the fire at Sewell Brown & Company, wasn't it?

A. That is what I understand today.

Q. Now do you mean to say that the fire occurred at Sewell Brown and Company on September—when did it occur—September 19th or 20th?

(Testimony of Sidney Sternau.)

A. I don't know.

Q. Do you mean to state that if the fire occurred on the day before or two days before and you didn't know that the fire had occurred at Sewell Brown and Company?

A. I did not, because we are not interested in apricot kernels to any great extent. [205]

Q. And when Mr. Bonzi called at your place of business on September 21st and said that he wanted you to get out of this contract, did Mr. Bonzi say at that time that the fire had occurred at Sewell Brown and Company?

A. Mr. Bonzi didn't call at our office; our Mr. Hanshaw went down to visit him and get an answer, and he didn't make any reference to this fire.

Q. Were you present?

A. I was not present.

Q. Then how do you know he didn't make any reference to this fire?

A. Mr. Hanshaw would have told me if he did. We didn't know about it.

Q. You state in this letter "we just had the packer in." You wrote this letter yourself. That isn't true; the packer wasn't in your place of business?

A. I think I called him in the office after that and wanted an explanation from him.

Q. After that——

A. After Mr. Hanshaw made the report.

Q. On that same day?

A. On the same day.

(Testimony of Sidney Sternau.)

Q. Then Mr. Bonzi came into your office?

A. Yes.

Q. And you had a conversation with him? [206]

A. Yes.

Q. Did Mr. Bonzi in that conversation tell you that a fire had occurred at Sewell Brown and Company's plant? A. No, sir.

Q. Did he tell you why he wanted to get out of the contract?

A. Yes, because he couldn't set up his plant—get his plant set up.

Q. Now, Mr. Sternau, you weren't going to do anything about the cracking of these kernels in your plant, were you? A. No, sir.

Q. So the reason Mr. Bonzi wanted to get out of the contract was because he was having difficulty in setting up his plant? A. Yes, sir.

Q. Had he made any attempt to set up his plant?

A. I think he contacted several machinists and he wasn't able to get it set up, as far as I know.

Q. Who told you that?

A. Mr. Bonzi and the machinists. We were talking to them——

Q. Now, Mr. Sternau, this was in September, right about September 21st, that you wrote this letter. About September 23rd, just a couple of days later, Mr. Kaplan was out here and telephoned you, didn't he? A. Yes, sir.

Q. And did you tell Mr. Kaplan that it would

(Testimony of Sidney Sternau.)

be a favor to you if he could get someone to crack the kernels? [207]

A. At the present time I don't recall the conversation.

Q. You don't remember what the conversation was?

A. No; I know he called me and talked to me about cracking the kernels but I don't remember the whole text of the conversation.

Q. Don't you remember anything about the California Packing Corporation?

A. Yes I think he mentioned their name to me.

Q. Did he tell you that he had arranged with the California Packing Corporation to do the cracking of the kernels operation for you?

A. He might have told me, because I remember he said he could get them cracked.

Q. Did he ask you to get in touch with the California Packing Corporation and make your arrangements so as to get the matter concluded and finalized? A. I believe he did.

Q. Thereafter, Mr. Sternau, did you ever get in touch with the California Packing Corporation to find out if you could have your kernels, the kernels that you expected to deliver, cracked by the California Packing Corporation?

A. No, we never did.

Q. Did you ever communicate with Mr. Kaplan and say that you weren't going to communicate with the California Packing Corporation? [208]

A. No.

(Testimony of Sidney Sternau.)

Q. You simply then relied upon Mr. Bonzi to do the cracking; is that correct?

A. Yes, sir.

Q. And Mr. Bonzi never set up his plant to do any cracking.

A. Yes, sir. No, he never set up his plant.

Q. He never set up his plant? A. No.

Q. And therefore, because Mr. Bonzi did not set up his plant to do any cracking, you didn't make any delivery of apricot kernels; is that correct?

A. Mr. Bonzi—Mr. Bonzi had to deliver them to us.

Q. Mr. Bonzi was going to deliver to you?

A. Yes, and we were——

Q. And Mr. Bonzi didn't deliver to you?

A. Correct.

Q. And you didn't deliver to the American Almond Products Company?

A. That is correct.

Q. Now then, Mr. Sternau, you do recall, you have testified that in your conversations with Mr. Kaplan you told him that your price for the apricot kernels that you would sell, wanted to sell, would be competitive; is that right?

A. That is correct.

Q. The end of August 1955 Prince, Keeler telegraphed you to [209] the effect that the price had been announced and that Mr. Kaplan said that the price prevailing and the opening price was seventeen cents; isn't that true?

(Testimony of Sidney Sternau.)

A. That is true.

Q. And you telegraphed back, is it not a fact, that the price was not 17 cents but was 18 cents; is that correct? A. Correct.

Q. And when you telegraphed that back you had ascertained that that was the price of regular apricot kernels, hadn't you? A. Yes, sir.

Q. And then you agreed over the telephone, or your business, the company, did with Prince, Keeler and Company, to fix the price at 17 and a half cents; didn't you? A. Yes.

Q. Now, then, Mr. Sternau, when you agreed that your price would be competitive at *and* seventeen and a half cents, the same as the others, did you expect to deliver apricot kernels of any different quality than your competitors were delivering?

A. We expected to deliver apricot kernels; we never mentioned our competitors; the sale, what they are going to deliver.

Q. You said that your price would be competitive.

A. Competitive price; we never said anything about quality.

Q. If your price was going to be competitive, did you expect to deliver any different quality or lower quality than your [210] competitors at the same price were charging?

A. We only sold apricot kernels; not regular apricot kernels.

Q. You knew that broken kernels were sold for the purpose of making oil, did you not?

(Testimony of Sidney Sternau.)

A. No, I did not.

Q. You knew that broken kernels were sold for far less price than whole kernels, didn't you?

A. We sold apricot kernels; we didn't sell apricot kernels pieces. The contract called for apricot kernels subject to approval of the sample.

Mr. Eisner: I think that is all, if the Court pleases.

The Court: Step down.

Mr. O'Connor: Just a few questions, your Honor.

Redirect Examination

Q. (By Mr. Connor): Mr. Sternau, when Sunset Sternau Food Company was making apricot paste, who was the head of the corporation?

A. Clarence Sternau, my brother.

Q. He died in 1947, didn't he?

A. He did.

Q. Who handled the office details of the purchasing and so forth? A. He did.

Q. And following his death who handled them?

A. Richards—Mr. H. S. Richards.

Q. Did Mr. Richards handle them likewise when Clarence Sternau was alive?

A. No, he didn't; Clarence Sternau handled them.

Q. Did you have anything to do with purchasing apricot kernels or making the paste or anything of that sort? A. No.

Q. Prior to your brother's death?

A. No, only the selling.

(Testimony of Sidney Sternau.)

Q. You did only the selling for the firm?

A. Yes, only the selling of the kernel paste; we never sold kernels.

Q. After the fire at Sewell Brown did you attempt to get any further reply from Mr. Bonzi concerning any delivery to you under a verbal contract of the apricot kernels?

A. Yes, we did.

Mr. Eisner: That is objected to as irrelevant, incompetent and immaterial, not proper redirect examination. Any conversations that he might have had with Mr. Bonzi would be purely hearsay.

Mr. O'Connor: It is already hit upon in cross examination, if the Court please, as to what he did with Mr. Bonzi:

The Court: Let the question and answer stand. Let's proceed.

Q. (By Mr. O'Connor): Mr. Sternau, did you yourself, or any [212] member of the firm at the time in 1955, have any familiarity at all with the customs prevailing so far as apricot kernels are concerned and their sale and purchase?

A. None whatsoever.

Mr. O'Connor: I think that is all.

Your Honor, there have been admitted certain letters which I wrote. If counsel will waive any bar to my appearing in this action, I would ask at this time to be sworn as a witness and testify. Any question, counsel?

Mr. Eisner: No; I will waive any objection to your testifying.

RAYMOND J. O'CONNOR

called as a witness for the Defendant, having been first duly sworn, testified as follows:

Mr. O'Connor: With the permission of the Court, I would prefer to make the statement and counsel can cross-examine just in the interests of saving time, in connection with Plaintiff's Exhibit No. 18, the letter of October 31, 1955, which I directed to Mr. Rudy Bonzi, and I believe a letter of November 3rd, which is in evidence——

Mr. Eisner: I think you better ask the question, so that I may know what the question is directed to.

Mr. O'Connor: Very well.

Q. Did you on October 31st, cause a letter to be directed to Mr. Rudy Bonzi? [213]

A. Yes.

Q. Prior to the sending of that letter, did you have a conference or telephone call from Mr. Sidney Sternau respecting the Bonzi matter?

Mr. Eisner: That is objected as irrelevant, incompetent and immaterial and hearsay.

Mr. O'Connor: The letter has been introduced, if the Court please. The Court has admitted it into evidence.

The Court: For what purpose?

Mr. O'Connor: It has been admitted as part of plaintiff's case, your Honor.

The Court: Read the letter.

Mr. O'Connor: The letter reads as follows—a letter directed to Mr. Rudy Bonzi, Route 4, Box 3115, Modesto, California:

“Dear Sir: This office represents Sunset-Sternau

(Testimony of Raymond J. O'Connor.)

Food Company of Modesto. We have been advised you authorized the company to sell on your behalf 75 tons of shelled apricot kernels. The company has made the sale per your instructions at 17½ cents per pound. The buyer has requested that they be advised of the shipping date.

“Efforts to reach you apparently have been un-availing for the past week. It is absolutely essential that you get in touch with the company [214] upon receipt of this letter, and complete the transaction. If this is not done, it will expose both the company and yourself to liability and sale with right of the company to go against you for any loss that may be sustained by reason of non-delivery.

“Will you therefore kindly get in touch with the company immediately upon receipt of this letter.”

The Court: That is dated what?

Mr. O'Connor: October 31, 1955. I submit that the question respecting my information for writing that letter is pertinent in view of the fact that the Court allowed it to be introduced in evidence in the plaintiff's case.

The Court: The letter will have to speak for itself.

Q. (By Mr. O'Connor): Mr. O'Connor, were you advised by Mr. Sternau of a verbal contract with Rudolph Bonzi for the sale of apricot kernels which were to be in turn sold by the company to the American Almond Company on or about the date of this letter?

(Testimony of Raymond J. O'Connor.)

Mr. Eisner: That is objected to as irrelevant, incompetent and immaterial and hearsay.

The Court: Objection is sustained.

Mr. O'Connor: I will make an offer of proof, if the Court please.

The Court: Make a record on it.

Mr. O'Connor: That by the question just asked—— [215]

The Court: I sustained the objection. The record will have to speak for itself.

Mr. O'Connor: Very well; then I offer to— well, I will withdraw that.

Q. Were you at the time that you wrote this letter, Mr. O'Connor, in receipt of all the documents or any of the documents relating to the transactions between Sunset-Sternau Food Company and American Almond Company?

Mr. Eisner: Same objection, if the Court please; the documents speak for themselves.

The Court: I will allow it.

A. No, I was not.

Q. (By Mr. O'Connor): With reference to the letter of November 3, 1955, which has been introduced as Plaintiff's Exhibit No. 23, a letter addressed to Mr. Rudy Bonzi, Route 4, Box 3115, Modesto, California, were you at the time of the writing of that letter, Mr. O'Connor, in receipt of, or did you have in your possession any of the documents or correspondence between the American Almond Company and the Sunset-Sternau Company with reference to apricot kernels?

(Testimony of Raymond J. O'Connor.)

A. No.

Q. When did you first obtain the documents with reference to those dealings?

A. November 8, 1955.

Q. Did you have a telephone conversation with Mr. Eisner, [216] representing American Almond Products Company on or about November 14, 1955?

A. Yes.

Q. What was the subject matter—where was that telephone conversation held?

A. San Francisco.

Q. What was the subject matter of that conversation?

A. Mr. Eisner had either telephoned me and I returned his telephone call—the subject was a meeting to be held by—Mr. Kaplan being present in San Francisco, Mr. Eisner desired a meeting with Sunset-Sternau Food Company, and myself, in Modesto the following day with Mr. Sternau and with Mr. Bonzi.

It is my recollection that Mr. Eisner had at that time either himself arranged for the interview with Mr. Bonzi's attorney or the arrangement was made through the office of Sunset-Sternau.

I told him I had no objection to such a conference but that, due to a previous court commitment, I could not be present; that in order to settle any question that might arise out of the correspondence and in order to help his client, who was apparently a customer of the Sunset-Sternau Food Company, and Mr. Berke of Prince-Keeler, we

(Testimony of Raymond J. O'Connor.)

would attempt to get Mr. Bonzi at such a meeting and try to get the apricot kernels for his client; but that nothing was to [217] be discussed at that conference in my absence relative to any liability of Sunset-Sternau for delivery of any apricot kernels to American Almond Products Company—or American Almond Company, I believe it is.

Q. Did you have further telephone conversations with Mr. Eisner on the subject matter of this action?

A. Yes. On November 16th, Mr. Eisner telephoned me and told me that efforts to obtain the kernels from Mr. Bonzi had proved fruitless and that he had a copy of the letter which had been written, I believe on the same date, November 15th or November 16th, and he had been advised Bonzi would not sell to American Almond Products, and I advised him at that time that if that was the fact, Sunset-Sternau could not help them any further, and that so far as negotiations were concerned, we were sorry, but we felt that there was no obligation on the part of Sunset-Sternau.

Mr. O'Connor: No further questions.

Cross Examination

Q. (By Mr. Eisner): In this conversation, Mr. O'Connor, of November 16, did you say that if action was filed against Sunset-Sternau Food Company, that you were going to implead and file a cross-complaint against Bonzi?

A. I believe that at that time I did mention

(Testimony of Raymond J. O'Connor.)

that we would try to get Bonzi in this action. I think you are correct in that. [218]

Q. And is it a fact, Mr. O'Connor, that after the action was filed, I called you on a number of occasions and asked you if you wanted to bring Mr. Bonzi in as a third party defendant and that I was holding the action in abeyance to give you that opportunity if you so desired.

Mr. O'Connor: Well, I will have to object to that question on the ground that it is improper cross examination, incompetent, irrelevant and immaterial, so far as the issues in this action are concerned.

The Court: The objection will be overruled.

A. I don't recall that you said that you would hold the action in abeyance, Mr. Eisner. I think the discussion was on the basis that I was giving some thought as to whether or not Mr. Bonzi could be held by Sunset-Sternau because of the fact that there had been no written contract between Sunset-Sternau and Bonzi of any kind.

Q. My question, Mr. O'Connor, was whether or not you stated in this discussion with me, that you wanted an opportunity to implead Bonzi. That was the question?

A. That could be. I think that I did take and give considerable thought to whether or not Bonzi could be properly impleaded.

Q. Just what the conversation was; I am not asking you what you thought.

A. It could be. Yes, it could be. Well, whether

(Testimony of Raymond J. O'Connor.)

you held up the action in abeyance, that I can't agree to. I don't [219] think the action was held up, necessarily.

Mr. Eisner: No further questions.

Mr. O'Connor: No further questions.

The Court: All right. Is that the case?

Mr. O'Connor: Yes, that is the defendant's case, your Honor.

The Court: On both sides?

Mr. Eisner: Yes, your Honor.

(Thereupon the matter was continued for argument following five, five and five days for submission of briefs.) [220]

Monday, March 25, 1957—10:00 A.M.

The Clerk: American Almond versus Sunset-Sternau, for argument and submission.

Mr. Eisner: May I proceed?

The Court: Will you indicate what time you wish to take?

Mr. Eisner: Well, there are a number of exhibits, if the Court please, that I would like to call attention to. I probably won't take it, but I would like an hour's time.

Mr. O'Connor: Oh, if counsel is going to take an hour, your Honor, I think I can cover it in a half hour. I wouldn't want to be bound by it. I will try to. I think most of the matters have been covered by the briefs to date.

The Court: I have read all the cases.

Mr. O'Connor: I have taken the occasion to

write up a supplemental brief by way of reply.

The Court: Proceed.

Mr. Eisner: If the Court please, your Honor will recall that this was a case of sale of 75 tons of regular apricot kernels in August of 1955. Mr. Sternau, President of the defendant, in company with a representative of his broker, Prince-Keeler and Company, Inc., of New York, called upon Mr. Kaplan of the American Almond Products Company, the plaintiff in the action, and stated that he would have apricot kernels, regular apricot kernels, for sale. He had a small sample with [221] him of those kernels at the time. He said, as to price, that his price would be competitive and that there would be approximately 75 tons that he could offer.

Mr. Kaplan stated that the sample looked all right, the small sample that he had, but in order to properly test the quality of kernels in his plant for manufacturing purposes, he would have to have a larger sample of approximately 200 pounds submitted to him.

Thereafter the price of regular apricot kernels was announced in the market, and the broker wired Mr. Sternau, or the company, that the price had been announced, that Mr. Kaplan said that it was 17 cents a pound and that he was ready to buy the 75 tons of apricot kernels.

Mr. Sternau wired back that the market price of regular apricot kernels was not 17 but 18 cents a pound, and then there was a telephone conversation between Mr. Sternau, the defendant, and

Prince-Keeler and Company, and the price of 17½ cents was agreed upon.

Then the 200-pound sample was forwarded by the defendant to the American Almond Products Company, and on the first of September, 1955—this was immediately after the telephone conversation between Mr. Sternau and Prince-Keeler and Company—Prince-Keeler and Company sent a letter to the defendant which is Exhibit 7, and in this letter he said this:

“Confirming today’s phone conversation with you, [222] we immediately contacted the buyer, Mr. Kaplan, of American Almond. He felt that due to the fact that you fellows were new in the business, he should get a slightly lower price than the current price. However, he went along with us, paying your price of 17½ cents; in fact, he was most cooperative.

“Now, then, since we are both in this deal, we made it our business to find out authentic details on the method of operation. For your information, we found out that some packers supply DFA certificates and some do not. Terms are always sight draft 2 per cent f.o.b. dock California. With regard to shipping and packing, this is designated on enclosed contract, which we believe will meet with your approval. If there are any further questions on this, do not hesitate to contact us. We certainly are glad to be able to close this business, and thank you for your cooperation.”

Now, then, the enclosed contract that was sent on September 1st, 1955, was this Exhibit 8. This

Exhibit 8 is a broker's memorandum. He issued bought and sold notes—a bought note to the buyer and a sold note to the seller, identical in form, setting forth all of the terms of this contract. And at the bottom of this contract there is this provision:

“This memorandum shall be subordinate to a more [223] formal contract if and when such contract is executed. In the absence of such contract, this memo represents the contract of the parties.”

Now then, this was sent to Mr. Sternau, the Sunset-Sternau Food Company, on September 1st, 1955. They retained this memo without objection, without exception or any question.

Then on September 6, 1955, Sunset-Sternau Food Company prepared what is in evidence as Exhibit 9, which is a formal contract covering the same transaction, based upon the broker's memorandum, and sent that to Prince-Keller and Company.

When this was received by Prince-Keller and Company, the sample of 200 pounds had just that day been received by American Almond Products Company—thereabouts—and it was stated that the sample had been tested, that it was satisfactory and approved. But attention was called to the fact that there were in this sample an inordinate number of broken pieces. And at the same time that this conversation occurred, Mr. Sullivan told him that he had received a formal contract from the Sunset-Sternau Food Company, which he was sending him.

Mr. Kaplan asked, is there included the regular provision in this contract that the broken pieces shall not exceed five per cent by weight? He said "That has always appeared, either expressed or implied, in every contract. In many instances it is included, and I would like to have it included in this. And will you ask that it be done?" [224]

Then on September 8, 1955, that same day, Mr. Sullivan wrote Mr. Sternau as follows:

"Mr. Kaplan of American Almond Products Company, Inc., phoned today to advise that the two 100-pound bags of apricot kernels were received and found satisfactory with one exception—the broken kernels far exceeded the normal tolerance. We advised him that we were mailing your formal contract 2023, received today. However, during the discussion, he advised that he had overlooked the following standard clause: 'Merchandise not to exceed five per cent by weight of broken kernels,' and requested that we add this on our contracts and return yours for the same addition. He advised that all regular suppliers, namely, Calpak, Rosenberg, insert this clause, which is a recognized condition of sale for this particular item. It was not brought up before because he assumed it would be included as a matter of course in your contracts. We are therefore returning your contract No. 2023 as enclosure and would appreciate your authorizing the addition of the above clause in compliance with the buyer's request. Awaiting your advice in this matter, Yours very truly, Prince-Keeler and Company, Inc."

Now when on the stand, Mr. Kaplan explained and stated that [225] Mr. Sullivan had not given a completely accurate statement of what he told him. He told him that it is always a recognized condition of the contract of sale, that Calpak includes it, but not all others, but when omitted, it is implied.

For example, we have in evidence in this case, if the Court please, contracts of Rosenberg Bros. and Company, in evidence here. I mention it at this time in passing. It is Exhibit No. 43, such a contract, in which there was this purchase and in which there is no mention of it. But as stated and testified by the expert witnesses, both of them, and by Mr. Kaplan, it is always an implied term of the contract.

We have also in evidence the contract of Mayfair Packing Company, which is also for regular apricot kernels, in which there is no mention of the percentage of broken kernels. We have also the exhibit, the contract of sale by California Prune and Apricot for apricot kernels, and in this case it is rather interesting that in the broker's memorandum it is recited, "Not to exceed 5 per cent weight broken," but in the normal contract that followed it, there is no mention of the five per cent broken kernels. It was implied.

And in the case of Sewell Brown and Company we have the broker's memorandum, which was the only evidence of the contract, in which there is no mention of the percentage of broken kernels. But it is always an implied term of the contract.

Now then, this letter which I have just read, if the Court [226] please, is dated September 8, 1955, and in which this tolerance which is always a part of the contract, is mentioned.

Now then, did Mr. Sternau of the Sunset-Sternau Food Company make any reply to that letter? Did they state, "Well, we want to look into it to find out if this is an implied term of the contract"? Did they say, "We are not agreeing to that as being an implied term of the contract"? Did they say, "We question it"?

No, by no means, if the Court please. And I call the attention of the Court that when the deposition of Mr. Sternau was taken, and even when he was on the stand, in corroboration, this question was asked of him:

"Q. Now, Mr. Sternau, after receipt of this letter, did you make any inquiry to ascertain whether a five per cent limitation by weight of broken kernels was the custom and usage in dealing with this product?"

His answer was: "I don't remember."

Now Mr. Sternau didn't have to make any inquiry of anybody else to ascertain that that was the regular custom of the trade, if the Court please. As a matter of fact, just at this time I may mention, it was most interesting at the time of his examination, when upon the stand he admitted that while he had not sold this particular product, that his concern had for years been engaged in the business of buying apricot [227] kernels and in processing them, and in the same manner that the

plaintiff in this action processed them, making them into a paste.

Now then, this letter that I have just referred to, if the Court please, is dated September 8th, and it wasn't until September 21st—from September 8th to September 21st—and after the fire had occurred, that that letter was replied to. And I call the Court's attention to this letter of September 21st, 1955:

“Dear Bill: (to Prince-Keeler and Company, Mr. Berke) We just had the packer in who was going to shell apricot kernels, and he advised me that he cannot guarantee five per cent pieces, that they cannot be any better than the sample.”

If the Court please, the packer he is referring to here is Bonzi, who was a garbage man, and with whom he had, or Sunset-Sternau Company had, a deal whereby they were jointly going to act in the shelling of these apricot kernels.

Now I want to mark this statement: “He is having a very difficult time in shelling these and would like to get out of this contract at this time, this season. Please advise us if you are able to do it. It will be a personal favor if it is possible to assist this man in setting up his plant the right way. Please advise by Monday about this.” [228]

Now as we go through these exhibits, if the Court please, they constitute a complete answer to every contention that the defendants can make in this case. The defendant in this case didn't question the fact of the broker's memorandum being delivered. It didn't question the fact of going to

New York and offering the sample and saying his price would be competitive. He doesn't question the fact that, without contradiction, the witnesses have testified to the existence of this regular custom of the trade which have existed for years—a most unusual case, if the Court please, in which there isn't a contradiction or any conflict in the evidence. Not even Mr. Sternau has assailed or attempted to contradict the existence for years and years of this established custom, or that it is the regular practice even of the Dried Fruit Association of California not to issue a certificate to pass regular apricot kernels unless they are within this tolerance.

Now then, the contentions that are urged by the defendant in this action are these:

It says that the broker's memorandum issued by the broker was not authorized in writing; that the broker did not have the authorization to issue the broker's memorandum, therefore the broker's memorandum, not being in writing, authorized in writing, is within the statute of frauds.

The second contention is that a written contract was intended to follow this broker's memorandum, that there was to be no contract until and unless there was a formal executed [229] contract; and no formal executed contract having been executed, there is no contract.

And the third contention is that we are not bound by this custom of the trade, this regular established custom, because we were not familiar with it.

Now then, if the Court please, as we go through these exhibits, we will see how the recognition of the existence of this contract answers each and every one of these contentions. If, for example, there was to have been no contract until and unless a written contract was executed, then there wouldn't have been a contract to be recognized as in existence.

The fact of the recognition of the contract, time after time, in writing by this defendant, is a complete ratification of the existence of the contract, and of the authority of the broker.

And as we have mentioned, if the Court please, there is also the element of estoppel, because the defendant in this case has repeatedly, until November 16, 1955, promised, time after time, to recognize the contract, and make delivery.

Now then, no merchant can recognize a contract and carry on and promise to make deliveries under it and then wait until the price rises, when it isn't to his advantage to make delivery, and then say there is no contract under which he promised to make delivery,—because, forsooth, it was not in writing. [230]

Now then, if the Court please, I have just read this letter of September 21st, which was written after the fire, and this is the letter in which they say they want to get out of a contract. And when in his deposition I asked Mr. Sternau, "What contract are you referring to when you say that he wants to get out of this contract?" this is what he said; this is the question on Page 24:

"Q. 'He is having a very difficult time in shelling these and would like to get out of this contract this season.' This contract that you refer to in this letter is the contract with the American Almond Products Company for 75 tons of apricot kernels?"

"A. Yes."

Now then, if the Court please, while we are upon this letter, I want to indicate, he says that these packers are having a difficult time in shelling these.

Now when he was on the stand—Mr. Sternau—I asked him: "So far as you know, had Mr. Bonzi ever shelled any apricot kernels, ever in his life shelled any apricot kernels?" and he said no.

"Who shelled the sample that was sent on?"

"The Continental Nut Company."

Now then, as a matter of practice, having a difficult time, where you can't do any better than five per cent, I call the Court's attention to the fact that in getting the [231] merchandise within the tolerance, it isn't a great problem if you are cracking and your cracking isn't good. All you have to do is to have the girls pick out the pieces. You can always comply with your agreement if you want to. It is simply a matter of cracking the kernels and he is having a very difficult time.

As a matter of fact, he never had any time; he never cracked any. He never tried to crack any. He wasn't prepared to crack any. So that statement is simply one made in order to lay a foundation to try to get out of the contract.

Now then, if the Court please, the next exhibit I want to call attention to is Exhibit 12, and this is

a letter also from the defendant in this action. This is what he got. This is from Prince-Keeler and Company.

The Court: Date?

Mr. Eisner: The date of this letter is September 28, 1955; it is from Prince-Keeler & Company:

"Just finished speaking to Mr. Jack Kaplan of American Almond Products, who advised me that you would agree to the following during your discussion with him on his recent visit to California. It is understood, due to the fact that you have no shelling facilities for apricot kernels, that it has been arranged through the kindness of Mr. Carroll Glenny of Calpak for Mr. Engell, Calpak's plant manager, to shell the apricot kernels which we sold American Almond for [232] your account. It is certainly fortunate that Mr. Kaplan had connections in Calpak; otherwise would we have been in a mess with this good buyer! Jack Kaplan was most co-operative in this matter.

"We will appreciate your keeping us informed concernig shipping information in this matter."

Now then, your Honor will recall the testimony that when Mr. Kaplan came out here after the fire and he telephoned to Mr. Sternau and Mr. Sternau said he would make delivery of the apricot kernels and that he was having difficulty in getting someone to crack them, and Mr. Kaplan said, "Maybe I can help you" and then Mr. Kaplan got in touch with Calpak and arranged for Calpak to shell them, and then phones Mr. Sternau back and told him that he had arranged with Calpak and Mr. Engell

to do some cracking, and he should get in touch with Mr. Engell.

And if your Honor will read that deposition—I am not going to take my valuable time for that purpose now—you will see what Mr. Sternau, when his deposition was taken, denies under oath, notwithstanding that these letters which refer to these conversations were called to his attention—denied that any such conversation had taken place with Mr. Kaplan.

The next letter, the next exhibit that I want to call attention to, if the Court please, is Exhibit 13. This letter is dated October 12, 1955, and is written to Prince-Keeler and Company. [233] I want to call attention to this. It is addressed to “Dear Willie”—that is William Berke:

“Personally I think the Assorted Nut Company * * *” and so forth; that has nothing to do with this case, is another matter.

He says: “The same thing goes to the American Almond Products. They are doing us no favor in getting Calpak to shell the apricot kernels (referring to the arrangement that was made); they are doing themselves a favor because they bought them at a low price and they wanted delivery.”

Now if that isn’t a recognition of the fact that a contract was made and that there was a purchase and that the buyer was trying to assist them in making delivery because they wanted delivery—assist them—I don’t know of any other answer that can be made to that. It is just perfectly obvious.

And your Honor will recall, so far as this written

formal contract was concerned, when Mr. Sternau received that back on September 8th or thereabouts, they simply put it in their files. They didn't send it back and say, "We want this contract signed in the form that we sent it, or there will be no contract." They didn't say anything of that kind. They put it in their files and recognized the fact thereafter, time after time—although that was not executed—that they had a contract under which they were obliged to deliver. [234]

Now the next exhibit I call attention to is Exhibit No. 14, which is a wire from Prince-Keeler and Company to Sunset-Sternau:

"American Almond insists on knowing when you are delivering apricot kernels per our order 912079, which was confirmed by you."

Now then, when they received that order, and Order No. 912079 is the broker's memorandum which is in evidence, did they answer back and say to Prince-Keeler and Company, "What do you mean by saying we confirmed your order? What do you mean by their wanting delivery?"

Was there any answer to that? I will show the Court the answer in a moment. But in the meantime I refer to a letter that they received, that Sunset-Sternau received directly from American Almond Company, which is Exhibit 15, in which it is stated on October 25, 1955:

"Dear Mr. Sternau: With reference our contract for apricot kernels of 9/1/55, you recall that on my recent trip to California, we had an opportunity to talk about the matter on the phone. At that

time you indicated to me as a result of Sewell Brown Company's loss of cracking plant by fire, you were attempting to accomplish your cracking out of pits with other people, and asked if I could be of some help. As you know, I immediately obtained the cooperation of California Packing Corporation. [235] Mr. Carroll Glennly stated that he was arranging with Mr. Raymond Engell, Calpak plant's manager, to accomplish the crack out for your account at some future date which would be convenient for both parties, details to be finalized between you subsequently.

"At this time I would appreciate hearing from you as to the existing arrangements insofar as we might be posted on approximate shipping dates of kernels on contract. We do not mean to press you for prompt shipment, but we do need some confirmation from you on the approximate schedule in order that we plan our own affairs intelligently.

"Please be kind enough to give us a prompt reply and accept our thanks for same.

"Very truly yours, American Almond Products Company."

All the references to their contract and reference to that conversation which Mr. Sternau denied existed or ever took place, although this letter was called to his attention and he was asked if it didn't refresh his recollection that there was such a conversation.

Well, he didn't reply to that letter, if the Court please, and as your Honor will recall, he never got

in contact with the California Packing Corporation. [236]

Now the next letter that I want to call attention to is a very important one. There isn't any answer to all of this, if the Court please.

Under the authorities, if the Court has had an opportunity to look at them, your Honor will find that so far as a ratification is concerned, an individual may, in referring to a contract that has been made—may say, "I don't recognize it; I refuse to perform in it."

But if he refers to it as an existing contract, it is a confirmation and a ratification of it.

And here in this case it goes beyond anything that could be imagined of a recognition of a contract. I call the Court's attention to this Exhibit 17. It is a letter dated October 31st, 1955, addressed to Prince-Keeler and Company:

"Dear Bill:

"In reply to your letter of October 26th (that is, in which the contract was referred to) wish to advise you (mark you this) and you can advise American Almond Products, that we are trying to get a commitment from a man with whom we are working on the apricot kernels. We are trying to arrange for the delivery. We have not written you because we have nothing to tell you. We have this man on the telephone every day for the past ten days, asking him to come to this office, but he has not done so, and today we are turning the matter [237] over to Mr. O'Connor to try to get a commitment from this man."

Now listen, though, to these words:

“We acted in good faith, and I know the buyer bought in good faith and that you sold in good faith, and we are going to do everything possible to get this matter settled within the next ten days.”

Now then, there just isn't any answer to such a recognition. There isn't any possibility of saying, “Well, there wasn't any contract because it wasn't a formal contract, a formal contract wasn't executed.”

There isn't any basis to contend, “Well, the broker's memorandum does not constitute a contract because there wasn't a prior authorization in writing.”

Now then, if the Court please, the statement was made in the letter that it was turned over to Mr. O'Connor. Now Mr. O'Connor is not only an astute attorney, but he is an officer of the defendant corporation. And Mr. O'Connor then wrote the letter to Mr. Bonzi which is Exhibit 18:

“Mr. Rudy Bonzi:

“Dear Sir:

“This office represents Sunset-Sternau Food Company in Modesto. We have been advised that you authorized the company to sell on your behalf 85 tons of shelled apricot kernels. The company has [238] made the sale per your instructions at 17½ cents per pound. The buyer is requesting that they be advised of the shipping date.

“Efforts to reach you apparently have been unavailing for the past week. It is absolutely essential that you get in touch with the company upon

the receipt of this letter to complete this transaction. If this is not done, it will expose both the company and yourself to liability on the sale, with the right of the company to go against you for any losses that may be sustained by reason of non-delivery."

Now the next exhibit is also a letter that I call attention to, from Mr. O'Connor to Mr. Bonzi. It is dated November 3, 1955. It is Exhibit 23. It says, being addressed to Mr. Bonzi:

"Dear Sir:

"Apparently you have disregarded my letter of October 31, 1955, re the sale made by Sunset-Sternau Food Company of 85 tons of your apricot kernels.

"You are advised that American Almond Products Company, Inc., which purchased these almond kernels, has advised Sunset-Sternau Food Company that they are going to file suit for damages for failure to abide by the contract calling for delivery of these almond kernels. You are advised that [239] Sunset-Sternau Food Company will join you as a defendant in any action filed by the Almond Products Company, Inc. You are further advised that in any event, suit will be filed against you for your breach of this contract by Sunset-Sternau Food Company for damages sustained by them in connection with your failure to abide by your contract.

"It is possible that such legal action may be avoided by you immediately contacting Sunset-Sternau Food Company and arranging to ship the

apricot kernels to the purchaser, provided, of course, we can obtain the consent of the purchaser to accept shipment at this late date."

Now the next exhibit I want to call attention to is the exhibit next in number, No. 24, and it is dated November 4, 1955, and is written by Mr. Sternau to Prince-Keeler and Company.

I call the Court's attention to these words:

"We have turned over to Mr. O'Connor all the information we have regarding the sale of apricot kernels, and we have placed it all in his hands. Please be assured that we will cooperate in every way possible with American Almond Products to get delivery."

In other words, they were promising, recognizing the [240] contract and promising delivery, time after time, while the market was rising and going up.

Now the next that I would like to call attention to is a very important letter, written by Prince-Keeler and Company. Prince-Keeler and Company had read the letter to plaintiff that they were going to make delivery, and this is what they say in reply; this is the letter from Prince-Keeler and Company to Sunset-Sternau:

"We quote from a letter received today from American Almond Products Company: 'Your order * * * (and so forth) We have this day received your letter of November 3rd on above matter, confirming your telephone call of November 2nd. We confirm hereunder our reaction to same; that is, that the delivery was going to be made, they were

doing everything. Seller indicates we are going to do everything possible to get this matter settled within the next ten days."

Remember, that was the letter from Sunset-Sternau to Prince-Keeler, and he says, "You can advise American Almond we are going to do everything possible to get it settled within the next ten days. Accordingly we will refrain from taking any action whatsoever in this matter pending the seller's telegraphic notice to us not later than November 10, 1955."

In other words, they would wait on it now, another of their promises of making delivery. [241]

On November 14, Sunset-Sternau Food Company wired Prince-Keeler and Company:

"Had very nice talk with Kaplan, who was conferring with O'Connor today."

Your Honor will recall that about November 14th, Mr. Kaplan came out to California, and Mr. Kaplan and myself went down to Modesto to try to see if delivery could not be had of these apricot kernels, and we left down there on about November 14th,—still promising delivery.

And then, if the Court please, it was not until November 16th, after that meeting, when the attorneys for Bonzi advised Sunset-Sternau Food Company that Bonzi was not going to make delivery of the apricot kernels, that, on November 16, 1955, for the first time, the Sunset-Sternau Food Company advised American Almond Products Company through the process of going through Mr. O'Con-

nor and then to myself, that delivery would not be made.

And this advice was based on Exhibit 32, which is the letter from the attorneys for Mr. Bonzi to Sunset-Sternau Food Company. He says:

“This will confirm my telephone conversation of earlier this afternoon with Mr. Hanshaw of your organization. Due to your past and continued failure to keep your agreements with my clients (that is addressed to Sunset-Sternau), Mr. Rudy Bonzi, Mr. Bonzi is of the [242] opinion that he is unable to crack any apricot pits during this season and thus is unable to delivery any apricot kernels to you or to your purchaser, the American Almond Products Company. We regret that this turn of events has been made necessary by your conduct, as we had looked forward to a profitable production in this line of merchandise.

“Very truly yours.”

Then it was, if the Court please, that there was the refusal to deliver.

Now then, if the Court please, so far as the contentions are concerned that this is an unusual case, in that there is practically no contradiction in the facts; we have here the recognition time after time in writing, as definitely as anyone could imagine, of the existence of the contract.

We have the repeated promises to make delivery.

We have the unquestioned proof and undisputed proof of the existence of this custom of the trade.

And so far as the contentions are concerned re-

garding the broker's authority not being in writing; if the Court please, we have the ratification of it time after time.

The principle of law is an elemental one, if the Court please, that, where there is intention of the parties that there shall be no contract unless it be reduced to writing, of course then there is no contract unless it is reduced to writing. [243] But where there is that intention—whether there is such an intention is a question of fact and people cannot play with it—they cannot blow hot and blow cold about it. And here we have in this case, in the very broker's memorandum, the recital that unless a formal contract is executed, this is the contract.

And we have the fact that there has been no attempt thereafter to have the formal contract executed, but kept in the file; and the recognition time after time, proof by conduct of both parties, that there was no intention that the execution or the existence of a contract should be conditional.

Now then, so far as this custom is concerned, if the Court please, counsel argues, well, this custom has been proved, and particularly in the case of, I think it is, Mr. Engell of the California Packing Corporation, he testified that in the case of the California Packing Corporation, they put it into their contract. Yes, that is the practice of the California Packing Corporation. But he testified that that custom has existed for years, beyond his own experience, which is over 25 years in this business. He testified that always regular apricot

kernels cannot have an unlimited percentage of broken kernels over 5 per cent.

Then we have the representative of Rosenberg, who had an equally long experience, testifying that it is not the practice of Rosenberg Brothers, but it is always a recognized implied term of every contract pertaining to regular apricot kernels. [244] And the fact that in so far as the Dried Fruit Association is concerned, that no contract for regular apricot kernels, no delivery will be recognized or certified if a percentage of broken kernels exceeds that amount.

Now then, if the Court please, we have the law upon the subject, which I have quoted in brief. First of all, where one engages in a trade, where there is a regular and well established custom of that trade, he is bound by that custom of the trade whether he personally knew of the custom or he didn't know of the custom. Now may I suggest here, if the Court please, the absurdity if it would be otherwise. Here Mr. Sternau entered this field, and let's assume that he was ignorant of it—which he wasn't, of course, ignorant of it at all. And assume he goes and offers to sell regular apricot kernels and he says, "My price is going to be competitive with other sellers of regular apricot kernels." And the American Almond Products Company, if your Honor will recall, purchased at exactly this same price, 17½ cents, at the same time, from the California Packing Corporation, and the California Packing Corporation representative testified that they made delivery notwithstanding the

fire and notwithstanding the fact that the price went up.

Now then, if the Court please, if one enters a trade and sells a piece of merchandise which, according to the regular established custom of the trade, has a certain standard of [245] quality, in this instance that you can't have an unlimited number of broken kernels, that you must not exceed 5 per cent, and he is asking the same price for his merchandise that other dealers in that trade demand for that product, which has a regular, recognized standard of quality, and then when he comes to make delivery of his merchandise for which he is asking the same price, and he says, "I am not going to deliver to you that quality of merchandise, I can deliver to you any number of percentage of broken kernels, because I didn't know about that custom," well, when you enter a trade and assume to deal in a product pertaining to that trade, you can't plead ignorance of the customs of that trade pertaining to what it is, and the quality of it, and you can't deceive your buyer by saying, "Well, I didn't know about that custom of the trade."

So, if the Court please, as a matter of law, as the authorities establish, which we cite in the brief, it is entirely immaterial as a proposition of law, where a general custom of the trade existed, whether the particular seller who went into the matter knew or didn't know about this custom of the trade. But in this instance he did know of the custom of the trade. He knew of the custom of the

trade because, if the Court please, he didn't have to inquire about it, he never disputed it. When it was written to him in all of the correspondence, and all of the conversations, he didn't say [246] then that the custom doesn't exist. He said in one letter that Bonzi was going to have difficulty in getting down to the tolerance and making delivery according to the tolerance. He didn't say that he was not bound by tolerance. He just said he was going to have difficulty. And therefore I would like to get out of this contract, he said. But the fact was, of course, as already indicated, that Bonzi did not have difficulty in meeting that tolerance—he didn't even ever attempt, make any attempt to meet the tolerance, and he could have met it if he wanted to.

And then, if the Court please, when Mr. Sternau was on the stand, he was asked the question, "I mean, did Sunset-Sternau Food Company make purchases of regular apricot kernels?"

"Answer: Yes.

"Question: Was the Sunset-Sternau Food Company in the same business as the American Almond Products Company, of making paste out of these apricot kernels?"

"Answer: Yes."

Well now, they knew perfectly well, and that was the reason, if the Court please, that he didn't have to inquire, because they knew as to what it was.

Now, if the Court please, so far as the measure—this is a case simply of a seller who had a deal with a particular producer with whom he attempted to

work. Difficulty developed between Bonzi and Sunset-Sternau. The market went up. [247] Sunset-Sternau tried to get out of the contract and failed, while promising delivery time after time; at the same time it was pressing upon Bonzi directly and through counsel to come through with the delivery. But Bonzi did not do so. This garbage man wouldn't cooperate. So not being able to get delivery from Bonzi, Sunset-Sternau says, "I won't deliver to you." And that statement wasn't made until November 16, 1955. And according to established law, the measure of damages is the difference between the market value at that date of the refusal of delivery, which was the first refusal to deliver, and the contract price. And there is no dispute in this case that the market price on November 16, 1955, was 43 cents a pound.

So if the Court please, I submit that the plaintiff in this action, I mean we have the excuse, of course, which is nothing. I mean, we have a direct contract here, and the plaintiff is entitled to recover the difference between the contract price and the market price on that date. I think there is a slight difference; in my opening brief I mentioned a few hundred dollars difference in the prayer, in the allegation of the market value, and the 43 cents, and I have asked leave to amend the Complaint to conform to that proof, which is undisputed, that the market value was 43 cents a pound.

The Court: I will now direct you to the clock.

(Recess.) [248]

Mr. O'Connor: If the Court please, I am con-

strained to agree with counsel in the present proceeding that there isn't too much by way of contradiction in the factual situation before this Court. In connection with the interpretation of the factual condition, there is a vast difference of opinion.

We have here a situation in which there is pleaded a contract as of a certain date. The Plaintiff sets forth in his complaint that as of September 8, 1955, there was a definite contract between the Plaintiff and the Defendant. As an integral part of that contract, the Plaintiff states that there was a custom which attached a condition or a clause to that contract. In other words, the so-called note of memorandum of Prince, Keeler, is not complete in and of itself, says the Plaintiff, but attached to it, added to that contract, is a trade usage or custom that this Court must find to be the fact. These facts we dispute. There is likewise the statement, of course, that Prince, Keeler & Company were the agents of the Defendant and could bind the Defendant and did bind the Defendant in the contract or sales memo which is dated September 1, 1955, and which was supplemented by a contract received by Prince, Keeler from the Defendant himself.

Now what are the facts? The facts are simply these, and they are uncontradicted, and they come within the evidence [249] submitted by the Plaintiff in this case. No. 1, there is no question but what from the evidence in this case before this Court, the defendants were new in this business. And that that fact was known to the Plaintiff in

this case. It was known, under the testimony of Mr. Sternau when he first had his conversation in July, in the middle of July, with Mr. Kaplan of the American Almond Company, and showed him the small sample that he had of the apricot kernels. It was confirmed by Mr. Kaplan in his talk with Mr. Sullivan, with Mr. Berke of Prince, Keeler Company, referring to Plaintiff's Exhibit No. 7, under date of September 21st, and the Plaintiff in this case stated to Berke, "We immediately contacted the buyer, Mr. Kaplan, of American Almonds. He felt that due to the fact you fellows were new in the business, he should get a slightly lower price." And he goes on to say, "Now then, since we are both new in this field, we made it our business to find out certain things"—the certificate and so forth—the terms. Then significantly, in a letter of Prince, Keeler of September 8th, signed by Mr. Sullivan, addressed to Sunset-Sternau Company, he states:

"Mr. Kaplan of American Almond Products phoned today to advise * * *" (and so forth.)
"* * * the 200 pound bag of apricot kernels were received and found satisfactory with one exception—the broken kernels far exceeded the normal tolerance." [250]

Then we come to this paragraph:

"We advised him that we were mailing your formal contract 2023 (which is Plaintiff's Exhibit No. 9 in this action) * * * received today. However, during the discussion he advised that he had overlooked the following standard clause: 'Mer-

chandise not to exceed 5 per cent by weight of broken kernels,' and requested we add this on our contracts and return yours for the same addition. He advises that all his regular suppliers, that is, Calpak, Rosenberg, insert this clause, which is a recognized condition of sale for this particular item. It was not brought up before because he assumes that it would be included as a matter of course in your contract. We are therefore returning your contract No. 2023 as enclosure and will appreciate your authorizing the addition of the above clause in compliance with the buyer's request."

Now, question: At that point, September 8th, which is the determinative date, the Plaintiff has set forth a contract in this case. We have two things which are before the Court: No. 1, was that sales memo a contract which was binding upon the defendant? And we have the position of the Plaintiff that Prince, Keeler were acting as the agents and could bind the defendant. And yet, significantly, in that letter they state, "We are returning your contract * * * we will appreciate your authorizing the addition of the above clause." [251]

Again, an affirmation of the fact that they had a limitation of authority, that they were unable to bind the Plaintiff on any of those matters. We have further a letter from Prince, Keeler, which is Plaintiff's Exhibit No. 16, the question of their authority to bind this defendant by means of this particular sales memo or any sales memo. And I quote from that letter:

"The buyer has our sales memo and no one knows better than I do when dealing with Sunset that every price is subject to confirmation from Modesto."

Mr. Eisner: Just a moment, Counsel; that doesn't refer to this contract, does it?

Mr. O'Connor: It does not, but it states that general authority.

Mr. Eisner: I just want you to make that clear, that when you said——

Mr. O'Connor: It refers to another contract, that's true. Now, however, the Plaintiff put this letter in, I didn't. Then it goes on to say, and this is significant in this case, on the second page:

"I do not know what your opinion is on the subject (referring to the subject matter, the general subject matter of this letter, which was not the apricot kernels), but I think we have tried to co-operate with you all the way right down to our contracts. We printed special contracts just for Sunset [252] which eliminated the arbitration clause, et cetera. Wonder how many of your other brokers have done this."

Now here they have the arbitration clause. Here is a recognition, if this Court pleases, that this particular type of sales memo itself was not authorized by the Defendant to Prince, Keeler. We have the fact, if the Court pleases, that they sought authorization to add a term to that particular contract, the 5 per cent clause. That authorization was never given. We have the fact, if the Court pleases, that throughout the correspondence, throughout the ne-

gotiations, the Plaintiff himself knew the limitation of authority on the part of Prince, Keeler to bind the defendants. In 1954, and we have in evidence Exhibit B, Exhibit A, the contract 2023, which was mailed by the defendant to Prince, Keeler immediately upon receipt of the sales memo, showing that in the ordinary course of business, which was testified to by Mr. Sternau, that upon receipt of those sales memos, they make up their own contract, they send it back for signature, by the buyer. And the same contract was signed by the Plaintiff in 1954, and during the very time that these negotiations were going on, may it please the Court, the Plaintiff purchased other products from this defendant, and they signed the same identical contract. And as a part and parcel of that contract, and as a definite knowledge put upon them of the limitation of authority of Prince, Keeler, we have Section 13 of that [253] contract, which is in evidence, which states, "This contract is executed in triplicate. No broker or buyer has authority to alter the contract in any way. Broker is not authorized to sign for seller." There are other terms which the defendant insisted in all cases be made a part of the formal contract between the parties.

Immediately upon receipt of the sales memo and following the ordinary course of business, they did transmit Plaintiff's Exhibit 9 to the brokers to forward to the buyer in this case. The buyer refused to sign it, because it didn't contain that particular clause. He knew that he had to sign such a contract, that that was the ordinary course of business

with Sunset-Sternau. He rejected it and had it sent back for inclusion of this clause.

Now the statement has been made by Counsel that the Defendant kept that memo, and that fact is significant. Well, why wouldn't they keep it? In the ordinary course of business, if they regarded it as merely a sales memo, subject to confirmation by a formal contract in writing, it would certainly keep it. It would keep it just as it would a letter or any other communication on the current subject matter. It kept it as part of its record, it returned its own contract, and when its contract was returned to it under date of September 8th, counsel says it is significant that it did not immediately reply to the letter of September 8th, written [254] by Prince, Keeler, who was the middleman and not the broker in this case. Not an agent of the Defendant, and not an agent of the buyer. There's no demonstration here that Prince, Keeler, for example, was authorized to sign on behalf of the Plaintiff in this case. There is no affirmation that there was authority in any way, shape or form, save and except as it suits their present purposes.

Now the course of conduct; there had been long lapses between the correspondence, as your Honor will note from the file, and the original letters of July 25th on through. On September 21st, the letter was written, and Mr. Sternau testified that he did finally, through one of the employees, contact Bonzi with reference to whether or not Bonzi could deliver under the 5 per cent broken kernel clause, and he was told that he could not. Now where does

that leave the contract? Leaves the contract here, if the Court pleases, that the terms of the offer originally made were not accepted by the Plaintiff. It proposed a counter offer, a counter contract, differing from the terms, because the broken kernels in the sample far exceeded the normal tolerance of 5 per cent. Now was the contract at this point, on the date September 21st, the admission that delivery could not be made under that clause—was that binding upon both parties? Was there any enforceability by the Defendant and against the Plaintiff? There was none, because of its [255] admitted inability to deliver under that clause. The letters that follow are merely attempts to close a deal which was still subject to a formal writing between the parties and this is confirmed, if the Court please, in the reply brief of the Plaintiffs in this case, namely, that there was at all times an uncertainty about the subject matter of this contract. On page 9 of the contract, of the reply brief, here is the language of Plaintiff:

“Certainly defendant could not expect to demand and receive the prevailing price for apricot kernels with the limited percentage of broken kernels, and deliver an inferior product with an unlimited percentage of broken. It would be absurd to hold that one could undertake to sell and receive the going price for a product where the recognized standard of quality in the trade is not bound to deliver that standard of quality because of ignorance on his part of the customs of the trade. (Sic).”

Now that brings us down, if this Court pleases, to what the Plaintiff considers to be an integral portion of this contract, the addition to this contract of a custom of the trade. Suppose we grant, for the purposes of argument, that the 5 per cent was a custom of the trade. The next question comes up, did the Plaintiff then, in connection with the very contract it asserts is a contract and is binding upon this defendant, say, "That's the complete contract." We rely on—on September 8, 1955—we rely upon this exhibit, [256] the bought and sold notes. Is that contract complete on that date? Do we rely on the fact that included in that contract is the 5 per cent clause? Oh, no. They demand of Sullivan, of Prince, Keeler, that there is to be added in writing to this contract the so-called 5 per cent clause, and Prince, Keeler, on the other hand, goes to the defendant and says, "We want your authorization," which they never received.

Now in order to serve their own ends, they now say, "Now it is a custom that attached." And yet it is put in their own witness, Mr. Engell's testimony, in connection with the 5 per cent clause, and I am reading from page 11 of the transcript of this testimony, as follows, where I questioned the witness:

"Question: Mr. Engell, was the clause put in these particular contracts with American Almonds at their request?

"Answer: It is common procedure and a customary practice to put the clause in, because it is not printed in the contract.

“Question: It is common procedure and customary practice to put that clause in a contract?”

“Answer: It is accepted by the industry in all dealings that we make.

“Question: And it is the customary practice to put it into the written contract, is that correct?”

“Answer: Yes.” [257]

Cross examination by Mr. Eisner—or further re-direct:

“Question: Mr. Engell, it is customary with California Packing Corporation. Do you know whether or not it is customary with other producers and sellers of apricot kernels, such as Rosenberg Brothers Company, such as Sewell Brown & Company, to expressly include such a tolerance clause or to let it be implied?”

Now I made an objection, and the Court allowed the answer. The answer was: “I know that other companies do use that clause.”

“Mr. Eisner: Question: Do they include it or do they not include it? I mean, expressly?”

“Answer: I would say they include it.”

I then withdrew the objection.

“Question: Are you personally familiar with whether or not Rosenberg Brothers & Company expressly include the clause?”

“Answer: That I couldn’t answer correctly other than what knowledge I have gained through association with the sales department, to the effect that other companies use the 5 per cent broken clause.”

From the lips of their own witness they have produced a custom, but they have proved a custom

far different from the custom that they have asserted in their pleadings, and which we had to meet. They have proved that it is customary in the trade that that clause is added in writing to the formal [258] contract.

Now Counsel made a point in his argument that others, namely Rosenberg Brothers and the like, do not include it in their contract. But they issue a certificate. And he stated the truth—I took down his words—when he said the certificate he refers to is a certificate issued only when the tolerance of broken apricot kernels does not exceed 5 per cent by weight. So if they issue the certificate, that is proof that the buyer—it proves to the buyer that the product does not exceed 5 per cent by weight of broken kernels.

Mr. Eisner: You misunderstood, Counsel. Just a moment. Rosenberg and no seller issues a certificate.

Mr. O'Connor: No, certainly, that's correct.

Mr. Eisner: The certificate is issued by the Dried Fruit Association, where a certification is requested.

Mr. O'Connor: That's correct.

Mr. Eisner: I mean, I don't want to interrupt, but I wanted to have your statement correct.

Mr. O'Connor: That is a correct statement. In other words, the product is examined and the certificate is issued, if it doesn't exceed 5 per cent. It is the same thing. In other words, the custom which is pleaded here, if the Court please, is that a condition was added to this contract, and they haven't

proved that condition. If it please this Court, that custom is a necessary part of this contract in order to make this [259] contract whole. Your Honor will recall that I asked a question of Mr. Kaplan whether or not they ever waived it, and he stumbled a bit.

Mr. Eisner: Ever what?

Mr. O'Connor: He stumbled a bit on the answers. There was never any written waiver at any time by the Plaintiff in this case of the necessity of that clause being in the contract. That was their demand, it was never fulfilled. They never again requested that, either Prince, Keeler or the Defendant to see that the contract be amended, that they be returned to them with the 5 per cent broken clause in there. And why? Because a fire had occurred, and they were trying to get delivery of anything they possibly could. No question about that. It is an unfortunate situation, it is unfortunate from both standpoints; but the fact is that the defendant couldn't comply with that condition, and that is the reason it never authorized it.

Now so far as the law on custom is concerned, I have cited cases and authorities in my brief which I think fully sustain the position we take, namely that there isn't any contract, and there isn't a custom proved, a custom that would add a condition to a contract. The cases cited by counsel for the Plaintiff in this case are all to the effect that custom and usage will be used to interpret the written words of a contract. In other words, there are [260] trade terms, as your Honor knows, in the

various industries and what might appear to be a jumble of words to the ordinary person not in the industry has a definite and concise meaning within that particular industry or business. And trade custom and usage is ordinarily applied to interpret those terms. There is definite price and quality and so forth, represented by symbols which the particular trades indulge in. That is the common and ordinary usage of trade custom and conditions. And trade customs and trade usages.

But here the Plaintiff has gone one step further and says, "We add this clause to it because it is universally the trade custom." I will submit that the authorities which I have cited and which have not been replied to in the reply brief of the Plaintiff in this case, are unquestioned, and that they don't prove the custom. They have an incomplete contract. They have nowhere proved the authority of Prince, Keeler to bind the defendant on the sales memo. Specifically, the evidence which has been produced, and which I have directed the Court's attention to, both in the brief and presently, is all to the effect—evidence put in by them, in so far as this case is concerned—that it definitely limits the authority of Prince, Keeler. Prince, Keeler, after all—what is their position here? They are a middleman, they are a broker. As they say in one of their letters, their position is put pretty clearly there, that they don't represent either side.

In Exhibit No. 27, in the brief of Plaintiff, they would have your Honor believe that Prince, Keeler were actually the agent and entitled to bind the

defendants, and that there could be a subsequent ratification. I have cited the definition of middleman, and in those cases, in California, which govern and control this case, it shows that Prince, Keeler in this case, is nothing but a middleman. They never purported to bind the defendant. Their sales memo was not even authorized by their own testimony, by their own evidence. But here is a letter, November 9th, which is Plaintiff's Exhibit No. 27:

"Dear Sidney:

"As you know, brokers are supposed to represent both packer and buyer. And under these conditions, we must be fair to both."

Now how could they represent both? If they have no written authority? It is a definite indication that they are the middleman, and the cases so hold, and I have cited to your Honor that they are merely the go-betweens between buyer and seller. They are used to forward the negotiations. Their offices are used to forward the completion of a binding contract between both buyer and seller.

In this case, if the Court pleases, there is no question but that Mr. Kaplan was fully aware of the position of the defendants with respect to its newness in the business. In the [262] reply brief of the Plaintiff, on page 9, he states, "Incidentally, Mr. Kaplan did not know what the defendants knew or did not know about the customs of the trade. All he knew was that it was his first transaction of this character with the defendant."

Now the argument and the presentation of the

case, because of the letter of September 8th, and the letter of September 1st written by Prince, Keeler after conversations with Mr. Kaplan in which they say that, Kaplan says that, "You are new in the business and therefore we should get something below market price for the use."

No. 2, in the letter of September 8th, where Kaplan again affirms that they are new in the business and he wants this clause written in. There is no question about it. Mr. Kaplan knew very well the limitations of the defendant in this case, and he knew very well the limitations of Prince, Keeler and their authority. He had had dealings with the defendant before, he knew that they had their own contract, and that it had to be forwarded from Prince, Keeler to himself for signature because he signed it. And during the very time these negotiations were going on for the sale of these apricot kernels, he signed another contract, which is in evidence, which put him upon notice of the limitation of authority of Prince, Keeler, and put him upon notice of the ordinary business practices of this defendant. [263]

What this amounts to is simply this. He knew that the defendant had an oral commitment with a fellow named Bonzi, and that they were relying upon him as their supplier. He knew that. Once he learned that, he never asked again for an amendment, the inclusion of the clause. He was going to depend upon the custom and trade and entrap the defendant by writing these letters and having Prince, Keeler write them for him. And he did.

What do the letters amount to? They amount to this, if the Court please. They amount to an attempt by the defendant in this case to consummate a sale; a question of ratification? No, because he couldn't comply in the original instance with the 5 per cent. But he still negotiated, hoping to complete a sale. This profit for him relieves the tension and the threat of a lawsuit. If you can't write letters for the purpose of trying to avoid any lawsuit, no matter what the merits of the lawsuit are, then it is a poor penalty upon those who are put in that position with the threat of a lawsuit. And very frankly, the letters which I wrote were in view of the fact that there were threats of lawsuits from Prince, Keeler and so forth. Why get into a lawsuit if you can get out by getting a delivery of some kind or other sufficient to satisfy somebody so they won't file suit? But as an admission of responsibility, no. If there was an admission of responsibility here, then was there ever, conversely, on the part of the Plaintiff, a waiver, in [264] writing, saying, "You can't deliver under the 5 per cent, but we are desperate now, because of this fire, and we will take anything you have got?" Oh, no, he didn't do that; he kept silent and he never did waive that. And it was contemplated by the parties here, may it please the Court, from the very inception of this deal through Prince, Keeler, that the formal contract would be reduced to writing. It was never reduced to writing. I cited the case of *Spinney vs. Downey*, which is controlling in California, which is still

recognized as the authority and cited in countless cases it came down. And that case, even though one party had signed the contract and had performed under it, the Court said the other party was not bound because they definitely contemplated the signing of a contract, a formal contract with all the terms in it. And that there was no estoppel created to plead the statute, and that is the holding of case after case that followed that decision, and follows it to this very day. The case of Spinney vs. Downey is controlling in California.

I have cited numerous cases on the question of custom and usage. And one who pleads custom and usage in an attempt to add a condition to a contract must show that at the time of the contract, this date, September 8th or September 1st, the date that this formal bought and sold note was made and issued, did he rely upon it? The answer is, he did not. And if he doesn't rely upon it, and if he wants it [265] included in writing, then can he now come in and plead that custom in order to make a complete contract? I think I fully answered it. The authorities I have cited, which I see no reason at the time of oral argument to repeat, so hold. But I respectfully submit to this Court that the subject matter and the conditions of this contract are still uncertain.

Question: Is the Plaintiff willing to accept broken kernels by more than 5 per cent? On the witness stand he said no. It wasn't because they were useless to him. They are an integral part of these contracts. And no trade custom inter-

venes to complete that contract. There is no contract. By their own pleading that has to be the answer, that there isn't any custom, may it please the Court, which has been amply demonstrated by the fact that the Plaintiff himself did not rely upon it at any time until the action was filed. But at the date he says a contract was complete, September 8th, he wasn't in reliance upon that custom. And for the Court, the problem is, can the Court in a matter of this kind then implement the parties' negotiations and say this or that shall be added? The authorities are to the contrary, that a Court will not intervene and add to a contract that which was not contemplated by the parties. Will the Court in this case add to the bought and sold note the conditions of the formal contract of the defendant, which the defendant sent to the broker to be signed and which contain very definite [266] provisions which the defendant wants in all its contracts, and which was acceded to on at least two occasions by the plaintiff himself? I don't believe so. But in order to make the contract complete between the parties the defendant is entitled to have some conditions attached. The conditions that it insists upon, in the normal course of its business.

This is not a case, if the Court pleases,—we have pleaded the statute of frauds because there wasn't any written authority of any kind or description given to the brokers by the defendants. None. The record is completely silent. Conversely, there is no written authority given in any way, shape or

form by the Plaintiff to the brokers to bind them. The evidence is complete upon the limitation of the brokers' authority in this case, even going as to this type of a note, that they had no authority to even issue this type of a note, but had special contracts for this defendant. This defendant is in California, these people are in New York. They are dealing at arm's length. This is a middleman. It is easier for him to maintain good relations with somebody in the immediate area than in the distant province of California. It isn't as if, may it please the Court, there has been a fraud perpetrated deliberately, wilfully, that one party has gained an advantage and another suffered a disadvantage. There is no question but in this case that the defendant has not received any advantage. There is a question, has the plaintiff [267] suffered any detriment?

Up until the time of the fire, now, the Plaintiff was so anxious to have this contract—if he was so anxious, to have it reduced to writing, and have that clause included, and he didn't receive any word by September 15th or 16th or the 20th, or something of that sort, then you would think, in the normal course of things, he would call Prince, Keeler and say, "Listen, where is that contract?" But did he do so? No. There was an ample supply of these things on the market, these kernels. But it was after the fire which destroyed—no question about it—the stock pile of this particular type of merchandise, and then and then only did he become insistent upon delivery under any conditions.

But not waiving the 5 per cent, nor ever again requesting that Prince, Keeler return this memo note with the condition on it which he had requested them to return to him. And in the letter of September 1st or September 8th, that that memo note be amended, and on its face, the 5 per cent clause be added to it. Never again did he refer to that. And he had definite and good reason. He is trying to recoup his loss at the expense of someone who was entirely innocent of a willful, deliberate wrongdoing, who was trying to complete a deal in a decent fashion. Can't do it; tries right up to the end. They had contracts with Bonzi, they came out here to see Bonzi. Bonzi saw the market going up, and so, not having any written contracts to be bound by, he is taking [268] advantage of the market.

Question: Should the defendants in this case be penalized when they have never received anything, and where these people were put upon notice of the difficulties he was having? The letters are to be taken as ratification? If they are, then I respectfully suggest to the Court that businessmen would never do business in writing, that they would do it all verbally so they could deny it. Yet in the ordinary course of business by correspondence, the imposition of a penalty upon a person who tried to do a job and complete a sale, knowing full the circumstances. And yet we have certain legal phases and conditions which must be met, and the burden is upon the Plaintiff, and that is the burden of proving the contract, the burden of proving the

custom. And I submit to the Court they have failed in the proof of each.

The Court: How much time do you wish?

Mr. Eisner: Five minutes.

The Court: All right.

Mr. Eisner: I mean, I don't need very much time, if the Court please.

The Court: What's that?

Mr. Eisner: I don't need very much time. I don't know what the——

The Court: You may change your mind before I get through. Proceed. [269]

Mr. Eisner: Well, would your Honor rather adjourn now until 2:00 o'clock?

The Court: Oh no, I am here to serve both you gentlemen.

Mr. Eisner: Well, I mean——

The Court: I had in mind this, that we go over until this afternoon and give both sides any time they wish. That is on the law side, now. In relation to the authority of the broker. Do I make myself clear?

Mr. Eisner: Yes, your Honor.

Mr. O'Connor: Yes, your Honor.

The Court: Also the law in relation to custom. Is there anything else that you gentlemen have in mind?

Mr. Eisner: I think probably the law relating to estoppel would be of value.

The Court: What is it?

Mr. Eisner: The law relating to estoppel.

The Court: Very well, add estoppel to the prob-

lem. Now in relation to pleading, Counsel calls my attention to the fact that you pleaded the eighth day of what?

Mr. Eisner: The 8th day of September.

The Court: Of September?

Mr. Eisner: Yes.

The Court: Now suppose the contract wasn't completed until October, where would we find ourselves?

Mr. O'Connor: Find ourselves in quite a different [270] position, your Honor.

Mr. Eisner: Well——

The Court: I call these matters to your attention in good faith, so that both sides will be prepared.

Mr. Eisner: Very well, we will be here at 2:00 o'clock.

The Court: Yes.

Mr. Eisner: All right.

The Court: If I were you, I wouldn't eat any lunch to interfere with your work. Let me say to you gentlemen that I don't think we will be here, we wouldn't be here if it wasn't for the fact that we had a fire.

Mr. O'Connor: That's correct.

Mr. Eisner: You don't? Well——

The Court: I say that kindly.

Mr. O'Connor: I think that is true.

Mr. Eisner: I don't know about that. If the Court please, Mr. Engell testified——

The Court: Well, I am giving you my state of mind, and I am not always perfect myself.

Mr. Eisner: Well, yes. Of course, the fire would

make—I don't think it makes any difference, if the Court please, what was the cause of it.

The Court: No, only the market.

Mr. Eisner: No—of the market going up?

The Court: You can't exclude that, and I wouldn't [271] exclude it, on the equitable side of this case. Counsel here depends upon the law, namely, that there wasn't a written contract.

Mr. O'Connor: That's correct, your Honor.

The Court: Period.

Mr. Eisner: I understand that, if the Court please, that he depends upon that. But he hasn't answered—Well, I won't argue the matter.

The Court: You are free to say anything you wish. Here I don't stand on ceremony. I want to get the best that's in you, to guide me here.

Mr. Eisner: I try to always give your Honor the best. But there isn't any attempt to answer the fact of the recognition of the existence of this contract, of the repeated promises to deliver under the contract, and, under the authorities, if the Court please, the broker's memorandum is by this recognition, ratified, beyond question.

The Court: Pardon? Repeated in many of these letters is the word "contract". What contract?

Mr. Eisner: Why, there is only one contract that is referred to, and that is the contract that was executed by the broker. As it said in the memo, "Unless it is succeeded by an executed contract, this broker's memorandum constitutes the contract."

The Court: You bring me some authorities on that. [272]

Mr. Eisner: Well, there are in the——

The Court: Well, you refresh my memory on it.

Mr. Eisner: I will do that, yes. And in other words, that it is regularly recognized that a broker in executing a broker's memorandum represents both buyer and seller in that respect.

The Court: I realize that. Take it a step further. How far can they go to legally bind either side? That's what we are into here.

Mr. Eisner: Well, they do legally bind. For example, in New York,—I mean a number of other states——

Mr. O'Connor: That's what we have been afraid of, New York. We have been afraid of that.

Mr. Eisner: Well, wait a minute. The broker needs no written authorization there. Under the California law, if the Court please, for the broker, there has to be either written authorization or ratification, and one is equivalent to the other. In other words, the broker's memorandum representing both parties, that's——

The Court: I understand they represent both parties. How far can they go to legally bind either side?

Mr. Eisner: They can go on to legally bind either side when that broker's memorandum is issued and accepted by both sides. In other words, when the broker issues his memorandum and that broker's memorandum, I mean of the sale, is delivered to the buyer and the seller, and is retained

[273] by the buyer and seller, that constitutes the contract, and it does so in every state, almost, except where there is a law.

Mr. O'Connor: Statute law.

Mr. Eisner: No, statute—almost a statute of frauds.

Mr. O'Connor: That's right.

Mr. Eisner: That the authority of an agent to execute a contract in writing must also be in writing. And therefore, if the Court please, that authority in writing can either be—and there is no dispute into the authorities. I have cited California cases, I have cited Federal cases, that where there is a recognition after the broker's memorandum of the existence of the contract, and that is in writing, even if the seller or the buyer says, "I am not going to comply with it," or something of the kind, that recognition of the existence of the contract constitutes a ratification and is in all respects equivalent to a prior written authorization, if the Court please. And that ratification is retroactive to the time that the broker has signed for the contract. So that if a broker signs, issues these brokers' memoranda, and if that broker's memorandum constitutes the written contract, if the Court please, if his authority in writing is either preliminarily given in writing or is ratified in writing, and it recognizes the existence of the contract after that broker's memorandum, then it is a ratification, and when your Honor says, "What contract?" all through, there is only one contract here, and [274] that is all that is referred to. That is the contract and couldn't have been a

contract unless, as recognized, it constituted the contract.

The Court: Now you see, you are put on notice, so you had better prepare yourself.

Mr. O'Connor: I think I have the answer in the authorities, your Honor.

The Court: So that either one of you are not in doubt about any phase of this case. I have got my mind open.

Mr. Eisner: Well, I appreciate that, your Honor.

The Court: And I can say to both of you, I can decide it either way.

Mr. Eisner: Well, I will be glad to be here.

The Court: That is the reason I am taking this afternoon to give you that opportunity.

Mr. Eisner: Yes.

Mr. O'Connor: Yes, I appreciate that, your Honor.

The Court: Now if there is any other question you want to ask me, I am here to try and answer them, so that——

Mr. Eisner: Well, it seems to me that the only defense that has been urged here is that——

The Court: Are you listening, Mr. O'Connor?

Mr. O'Connor: Yes, oh, yes.

The Court: Proceed.

Mr. Eisner: The only issue that is raised—usually [275] there is more in a case. Usually in a case of this kind there would be a question of market price. Usually in a case there would be a conflict, is there or is there not a custom?

Mr. O'Connor: Why question things which are obvious?

Mr. Eisner: Well, just a moment. Is there or is there not a custom? The evidence here is undisputed, if the Court please.

The Court: Why fix the market price here when it varies?

Mr. Eisner: Beg pardon?

The Court: How do you fix the market price here when there is variation?

Mr. Eisner: Well, by November 16th, if the Court please——

The Court: How do you fix that date?

Mr. Eisner: How do I fix that date?

The Court: I mean, the price.

Mr. Eisner: I mean that is the date as to the price. That is the date that was testified to, without dispute. Mr. Engell of California Packing Corporation, testified that that was the market price on that date that they sold.

The Court: How can you fix that date in relation to starting from the 17 and a fraction and going up?

Mr. Eisner: Well, it went up, if your Honor please, during——

The Court: You are establishing the high price.

Mr. Eisner: Well, that is the date. In other words, the date that is taken, if the Court please, and that is the undisputed law, the date that is taken is the date of the refusal to deliver. In other words, if the Court please——

The Court: Are we clear on that, Mr. O'Connor?

Mr. O'Connor: There is a question as to what the market price was on November 16th.

Mr. Eisner: No, I mean, but the Court is asking the law upon that question.

Mr. O'Connor: That would be so as of the date of refusal. There is a question as to the date of contract here too.

Mr. Eisner: I am speaking of the date of refusal. In other words, the——

The Court: That is the day to fix the price.

Mr. Eisner: That is the date to fix the price.

The Court: You have authority for that?

Mr. Eisner: Yes, no dispute about that.

Mr. O'Connor: There is no question about that.

The Court: All right. Then let him challenge it, then.

Mr. O'Connor: There is only one thing; that should be November 14th and not November 16th. We don't know what happened in the meantime.

The Court: What was the price on the 14th? The last date? [227]

Mr. Eisner: The last date, if the Court please, the 16th, it has been testified it was 43 cents. And there isn't any conflict in that.

The Court: Yes. And that is based upon 75 tons, is it?

Mr. Eisner: Yes, that's the price. That is the price per pound.

The Court: What would that amount to in dollars and cents?

Mr. Eisner: Well, I have it here.

Mr. O'Connor: Approximately \$38,000.

The Court: I want to be sure you have got some data on that.

Mr. O'Connor: Approximately \$38,000.

The Court: I am sure you have got some data on that.

Mr. Eisner: On the computation.

Mr. O'Connor: He has added it up very well, your Honor.

Mr. Eisner: Yes, I have a computation on that, and that was set forth in the opening brief, if the Court please. In other words, it is simply multiplying 75 tons by 43 cents and deducting the 17½ cents price under the contract.

The Court: Well, I am talking about dollars and cents. Now what is that amount?

Mr. O'Connor: \$38,500 roughly, your Honor.

Mr. Eisner: Yes, I think that's——

Mr. O'Connor: I checked the figures. [278]

Mr. Eisner: I am sure counsel has checked my figures on that to see that my figures——

The Court: Well, I am going to give you this afternoon to straighten that up. Now if you want further time, I will take it up at half past two or three, for this will be your last chance, gentlemen, and I am going to try and make up my mind when we conclude in this case, and I think the case will go forward in any event, for both sides have faith in their case, no matter how I decide it. Why, I think the Circuit Court will finally decide it, so protect your record. That is the only comfort I can give the losing party in this case.

Mr. Eisner: Well, let's say two o'clock, if the Court please. We will be here then.

(Whereupon a recess was taken until 2:00 o'clock p.m.) [279]

Afternoon Session—2:00 o'clock p.m.

The Court: Proceed, gentlemen.

Mr. Eisner: Now I would like to address myself to the questions that the Court has asked for the law on.

The Court: I want to call your attention to the fact that you are looking very seriously at me.

Mr. Eisner: Looking very serious? Well, it is a very serious case. I have great respect for the dignity of the Court.

The Court: Now I know that you are doing the very best that you can under difficulties, and I am trying to do the same thing.

Mr. Eisner: Yes. Well, I really don't think I should be under difficulties. That is why I can't understand. I must have failed in some respect, because the facts——

The Court: Well, maybe you got too close to your case and smothered it.

Mr. Eisner: No, I don't think so. I think I have the case. Now then,——

The Court: Maybe I could help you.

Mr. Eisner: Well, I am always ready to have help.

The Court: You have indicated that this broker's memorandum is a contract.

Mr. Eisner: That's right. [280]

The Court: Well, it says "Subject to confirmation."

Mr. Eisner: Yes.

The Court: "Of seller".

Mr. Eisner: That's right.

The Court: All right. Now then, we come to the next step. What does this record show in relation to confirmation?

Mr. Eisner: Well, the record shows that the seller, the defendant in this case, has recognized and confirmed the contract time and again in his correspondence. In other words, in the first place, if the Court please——

The Court: Now pardon me. I don't want to interfere. The only reason I mentioned that was to set it out for the purpose of the record. Proceed, gentlemen.

Mr. Eisner: Yes. Your Honor has read part of the contract. The further part of it is, mentioned in this memorandum, that in the absence of the execution of a more formal contract, this memorandum constitutes the contract between the parties. Now it has been testified to without contradiction in this case, that it is the general practice of the trade, I mean of those in buying and selling merchandise, for sales to be negotiated by broker's memorandum, just such as this. And in confirmation, not only do we have the testimony of that, uncontradicted, but we have introduced into evidence to substantiate that broker's memorandum in exactly the same form, language—I am showing that [281] this is a

recognized, you might say, stereotyped form of broker's memorandum, exactly the same, in which American Almond Products Company made purchases of apricot kernels. And there were no other contracts executed other than the broker's memorandum.

Now then, your Honor, I mean, I know, is so familiar with the proposition of law that where it becomes a question of intention, there is no true guide to the intention of the parties, no truer guide than their conduct following the transaction. Now when Counsel was trying to argue, remember that this question of insufficiency of the execution of the contract was not raised any time between all of this correspondence, between the parties, nobody, the broker, nobody raised any question about whether or not there was a contract in existence. The broker, when he wrote the letter to the defendant, and sent this broker's memorandum, said, "I am enclosing the contract, which I trust will meet with your approval." All parties, the seller, the buyer, repeatedly, up to, we will say, after November 16, 1955,—everybody recognized that a contract was in existence. The seller promised, I mean, time after time, to make delivery and said, "I am going to get delivery to you in ten days." I am making delivery to you, he said. The buyer said, "All right, I will wait for you." The buyer makes a trip out here to get delivery, way in November, because promises have [282] been made at all times to make delivery—recognizing the contract.

Now then, Counsel is making two contentions.

These contentions can always be urged, but the answers are so clear in this case, if the Court please, that that is the reason it is an unusual case in that respect. Now a broker's memorandum is a frequent method of negotiating sales, and is so recognized. A merchandise broker represents both parties. I simply brought the corpus juris here in order to read the statement of the general principle of law upon that subject, your Honor. This is on page 705, volume 37, under the subject of "Statute of Frauds."

"Broker. A broker who negotiates a sale of goods, wares or merchandise, is an agent of both parties for the purpose of making and signing a memorandum of the contract of sale."

Now then, if the Court please, in addition to this, we have quoted from one of the, I mean, it is a general principle going back from a New York case here, which is so similar that I have taken it as a typical example. This was a case in which the trial court was reversed by the Appellate Division or Court of Appeals. And I am quoting.

"The sale was made through a broker and the terms thereof stated in a broker's note, (That is, a memorandum a bought and sold note.) received personally by Plaintiff, [283] and a duplicate copy mailed to Defendant, which he claims was never received."

You see, Defendant in that case raised another contention. He said he never got the broker's memorandum that was——

Mr. O'Connor: Excuse me, counsel. I don't like

to interrupt. What is that case you are citing there?

Mr. Eisner: This case is the case of Thomas Henderson & Company, Inc. vs. Barrow.

Mr. O'Connor: Thank you.

Mr. Eisner: 164 New York Supplement 697. And I am still quoting:

"The learned trial Court at the close of Plaintiff's complaint dismissed the complaint for lack of proof, which rule we conclude constitutes reversible error. There was not alone ample proof to warrant the inference of receipt by Plaintiff and Defendant of the broker's note, which in itself may be a valid contract of sale, (you see, when the broker's note is received, and even though he denied receipt of it) but there was proof also of a ratification thereof by Defendant personally to Plaintiff, an admission of inability on his part to perform the same."

Now then, in this case, if the Court please, we have a broker's memorandum signed by the broker, which is sent and admittedly sent to both parties. Both parties have produced [284] their memorandum. It has been retained by both parties without objection or exception.

Now then, what has the testimony in this case done? You have to connect the correspondence to see what it means when the broker wires the Prince, Keeler Company and says, "What about my broker's memorandum which you confirmed?" And they don't answer, and they say, "Yes, we are trying to make delivery and we are having difficulty with the man with whom we are dealing." Now

then, if the Court please, a seller, or a party to a contract, doesn't make any difference which, whether he is buyer or seller, cannot recognize the existence of the contract, cannot promise delivery. As your Honor said this morning very truly, this price went up. It didn't go up to 43 cents all at once. I mean, it went up at stages from time to time. Remember that immediately after the fire, I mean to show that it wasn't all the fire. Mr. Kaplan was out here immediately after that and the contract is in evidence to show he bought regular apricot kernels at 28 cents at that time. Now then, if the defendant in this case had not promised delivery repeatedly and said, "I am going to make delivery to you," the Plaintiff in this case could have covered; I mean, if he had said, "No, I am not going to make any delivery, I don't recognize a contract at all, the broker exceeded his authority, it wasn't in writing," or I mean "I expected a [285] written formal contract to be executed," then the buyer could have covered, and would have covered at 28 cents when he could. But the seller, instead of doing that, constantly promised delivery, and it is in writing here, up to the time of November 16, 1955. And during that time, the buyer, of course, acted to his detriment, because he was induced by the seller to rely upon his promises.

Now that not only constitutes a ratification, but it constitutes an estoppel, and we quote it in the case here, and if the Court please, in which that is established beyond any question. And it is the case of *Moore vs. Day*, 123 Cal. App. 2nd, a rather re-

cent case, at page 134. Now in that case, if the Court please, there was no written contract, I mean, between the buyer and the seller.

The Court: What are the facts?

Mr. Eisner: The facts are these. The buyer kept promising the seller that he would take delivery, just as the seller in this case kept promising the buyer that he would make delivery. During the time that the buyer was promising the seller that he would take delivery, the price, instead of going up, kept going down, just the opposite to this, you see. So that when the buyer finally refused to take delivery, the price was far lower than it would have been, or than it was immediately following the contract, and during the period that he was promising to take delivery. So the Court said, in ruling, "You can't promise to take delivery [286] and wait until the price goes down when the seller could have sold if you had refused immediately, upon the market, at a price which was *was* not nearly as low as when you refused to take delivery. Consequently, you are estopped from pleading—you are trying to make use of the Statute of Frauds as a sword instead of a shield."

And I just read, it is a short paragraph, if the Court please, I will read it, because it is on all fours. There the shoe was on the other foot, but the shoes fit both feet.

"Applying the well settled principle hereinbefore set forth to the factual situation in the instant case, we believe that the Court's finding that Appellant was estopped from availing himself of the Statute

of Frauds is supported by the evidence and the law. The Court was fully justified in concluding that Appellant had made the offer for the beans and knew that respondents had accepted it; that respondents continued to rely on appellant's renewed assurances that he would complete the transaction from about March 1st to September 10th; that relying on appellant's assurances respondents refrained from selling the beans to others and altered their position to their damage and loss. Under such circumstances the Court had a right to believe that appellant was attempting to use the Statute of Frauds as a sword and not as a shield." [287]

Now then, if the Court please, exactly the same situation as here. A defendant is seller, and this correspondence that I have read, I mean, Counsel can't just explain it away. He does the best that anyone can do. He says that it is a case of trying to avoid a lawsuit. That's the reason that he wrote these letters recognizing a contract. But it goes back far earlier than any attempt to avoid a lawsuit. There wasn't any threat of a lawsuit. Really from just September right along, from the time there was first the attempt to get out of the contract by asking the broker, "Can't you get me out of this contract?" right after the fire, where he said, "My supplier, my packer, my garbage man, is having difficulty in cracking these pits." And so he wants to get out of the contract. Remember, that letter was written on September 21, 1955. And we have letter after letter, if the Court please. "I know that you sold in good faith, I know that the buyer

bought in good faith, and we are going to make delivery, and we are going to make it within—we are trying to straighten this out.” Now then, there isn’t any apology or explanation that can be made of it, and none has been attempted. It just isn’t there.

Now then, the question of law in the case is, can any party to a contract recognize the contract time after time as a binding instrument, or that a contract has been in existence, and then claim, one, that, “I am not bound because [288] my authority was not given in writing,” or two, “I am not bound because a formal written contract afterwards was not executed?” Now that just can’t be done. In the first place, so far as the Court please, as far as the ratification is concerned, and the Court realizes that ratification is exactly the same as prior authority, when a ratification is given, and this ratification—is something else, something amounts to a ratification, if someone acts on my behalf, for example, let us assume that this broker, Prince, Keeler, didn’t have authority, I haven’t gone into the preliminary letters, but they, in themselves show a recognition of the brokers to go ahead in this transaction. But, so the ratification is so clear that I have confined my argument to ratification. Let’s assume that there was no written authorization, and then followed this correspondence, if the Court please, this letter, these letters of recognition of this contract, and they couldn’t be any stronger than they are, I mean, and when I asked Mr. Sternau what contract he was referring to when he asked to get out of it, and

he says, "This contract." And of course this was the only contract. They didn't make any other sale of apricot kernels. That is what they were talking about. And I have cited to the Court here, and Counsel has not even attempted to answer the authorities on ratification.

Let's take the case of *Kelly vs. Clark* here, which is a [289] California case, because they come from California up to the Supreme Court of the United States, which I have quoted from. And all are the same. And I will read this, if the Court doesn't mind:

"The second point is that there is no memorandum signed by defendants or their authorized agents, and that the contract is therefore void by reason of the Statute of Frauds. The record clearly shows a contract entered into between Plaintiffs and Defendants through Davis in San Francisco and the Continental Brokerage Company in Chicago."

There, there were two brokers in this transaction.

"It is the law that a complete contract, binding under the statute of frauds, may be gathered from letters, writings and telegrams between the parties, relating to its subject matter, and so connected with each other that they may be said to constitute one paper relating to the contract. Conceding that the telegrams contain all of the elements of the contract, nevertheless, Defendant contends that the contract yet lacks the greatest essential, to wit, the signature of the parties to be charged, either by the parties themselves or by someone shown to be au-

thorized by them. By their signed telegram of August 5th, quoted above, defendants treated the contract as one made for them by the plaintiff."

Now then, we can't read these letters in this case— [290] not only treated, but they shouted that this is a contract which we are bound by, and that we would like to get out of.

"* * * signed telegrams and letters between the parties incorporated by reference the previous telegrams constituting the contract. Defendants neither denied the contract nor repudiated their acts, the acts in their behalf of the Continental Brokerage Company."

I suggest to the Court, those words, how pertinent they are here! The defendant in this case retains these contracts, they never objected in any manner to what Prince, Keeler had done. "In a letter written by defendant to plaintiff on August 14th, before the goods arrived in Chicago, wherein defendants seek to justify their position of interpreting the contract as one for immediate shipment, they say: 'We are sorry that a misunderstanding has arisen, but a contract is a contract.' "

Now is that any stronger than saying, by the defendant in this case, "I know that you sold in good faith and the defendant bought in good faith, and that we are going to deliver under the contract?"

"It will be thus seen that while there was not an express ratification of the effects of the contract expressed in words, there was an express recognition that there was a contract. The uncontradicted evidence is that the respective parties recognized

the transaction as one under a [291] contract. The difference between them being as to whether the contract calls for prompt shipment or immediate shipment."

Now if the Court please, the parties to this have recognized the contract time after time. So far as the plaintiff is concerned, the record is full of his letters, "When am I going to get delivery? What about our contract?" Referring to it, so far as Prince, Keeler saying, "When are you going to deliver under the contract?" They are referring to the contract. So far as the defendant is concerned, his letter is—one after the other, which I have read to the Court this morning, it is most significant, they indicate time after time there was a recognition of the contract and the promise of delivery. As was said by our Supreme Court in *Ballard vs. Nigh*, "Of course authority must be shown, but it need not be express authority. It may be implied. And one of the recognized legal methods of proving authority is by ratification. From such proofs, the law implies previous authority to the same extent as if in the first instance it had been expressly confirmed. The doctrine of ratification proceeds upon the theory that there was no previous authority and that the relation of principal and agent did not in fact exist, but implies it from the acts and conduct of the parties, and when so implied, is equivalent to previous authority and results as effectively to establish the relation of principal and agent as if the agency had been authorized [292] in the beginning."

Now then, that's that case, if the Court please. In other words, if there is a recognition of the existence of the contract, it is a ratification of the contract, and it is exactly the same as if previous written authority were given.

Now I have cited another case, Franklin Sugar Refining vs. Hegerton. In that case a letter written by the Defendant requesting that shipment be not made, I mean, the defendant wrote a letter and said, "Don't make shipment." And the Court held that's a sufficient recognition of the existence of a contract when you ask that shipment be not made. And this is the quotation: "This letter of * * * read in connection with the letter it answered is a full recognition, an acknowledgment, of all the alleged contracts of sale. The number of barrels bought, the base price of 221½ cents, and the time of delivery. And it meets the demands of the statute as fully as if the original memoranda of sale, including those of September and October, had been signed by the defendants. A written recognition of the contract expressed either in one writing or in several, taken together, even with the request for release, refusal to perform the contract, or the denial of its validity, is sufficient under the statute."

Now this case goes so much further than anything of that [293] kind. I mean, here we have promise after promise, recognition after recognition, of this contract, in this case, if the Court please.

In another case, of Franklin Sugar Refining

Company vs. Mullin Company, and this is a Federal case also, I read:

“We are clearly of the opinion that these papers signed by the defendant, recognizing the existence of the contract and requesting changes of it, were a compliance with the statute that some note or memoranda in writing of the contract of sale be signed by the party to be charged. We therefore hold, which holding is in accord with our holding in *Howell vs. Whiteman Schwartz Corporation*, the court below had erred in sustaining the demurrer and its order must be reversed and the cause remanded for further procedure.”

I would like to call one other case to your Honor's attention because it is so clear, and I think it is a paramount point in this case. The two are tied together, in other words. You can't recognize the existence of the contract, you can't promise delivery under it by your contract, and thereafter say, “Well, the agent wasn't authorized to execute the contract.” No more can you say, “Well, although I recognize the contract time and again as in existence, yet it wouldn't have been in existence, it wasn't in existence, because there wasn't any formal contract signed.” Now if it was [294] not the intent that the original memorandum would be the contract, it would never have been recognized, and couldn't have been recognized unless a formal contract was executed. One party to a contract cannot say, “Here I am bound by this contract, I promise you delivery,” and then when the time occurs subsequently, and after, particularly, the buyer, the

other party, has acted in reliance to his detriment, say, "Oh, well, those were simply statements of mine. Nevertheless, it was the intent that all my statements be disregarded, because the contract wasn't to be a contract until a formal contract was executed." You can't blow hot and blow cold, you can't ratify it, you can't recognize it, and then when it goes against you and you want by afterthought to raise every technical defense that ingenuity can bring to bear, say, "Well, that should have been in writing." You can't say, "That should have been a formal contract."

Now I will just read this one case. This is *Hull vs. Whitman Schwartz Corporation*, 7 Fed. 2nd 513:

"Admittedly in this case the defendant in this case did not sign the order itself, constituting the contract of sale. It was signed by Fred D. Townsend Brokerage Company, Brokers."

Now we get right down on all fours.

"If this were all, it might be necessary to show that the Townsend Brokerage Company was the agent of the defendant. This might be done, but it is unnecessary, for defendant [295] wrote and signed two letters referring to the contract."

In other words, here we could get right down and say by correspondence, and so show, that Prince, Keeler & Company was authorized to issue the memorandum of sale, which it did issue, and the conduct shows, we say, that it recognized it. But the Court said it is not necessary to do that in this case because the defendant has written letters in which he referred to the contract.

“On July 27, 1920, it wrote to plaintiff as follows: ‘If possible, cancel this cargo sugar, or if you cannot do this, do not ship until last half August. We are loaded with sugar for some time and cannot take it now. Please return your contract with your reply.’ On August 11, 1920, Defendant again wrote plaintiff saying: ‘Don’t ship any sugar until we advise you. We have more than we can finance.’ ”

That was the case of the buyer.

“While the note or memorandum must be signed by the parties charged,——”

and by the way, counsel, when he says that both parties have to sign, is in error. The Statute of Frauds provides that it must be signed by the party to be charged. That is, the party who was sued.

“While the note or memorandum must be signed by the party charged, the instrument itself need not be signed. The contract may be so referred to in a letter or paper [296] signed by the party to be charged as to incorporate it therein by internal reference. A letter will incorporate the unsigned contract by internal reference and bind the defendant even though he therein disclaims responsibility, if the fact of the consummated agreement appears therein, and its terms are recognized.”

In other words, even if the defendant, I mean, in trying to get out of this, out of a contract, just as the defendant in this case did, on September 28th, said, “Please get us out of this contract,” recognizing it, or if he said, “I can’t deliver, I can’t make these terms, I can’t do it,” I mean “I can’t

make the delivery," just as the buyer in this case said, "I can't take the delivery," it works both ways. "I have too much sugar, don't ship. I can't take it." The words "Please return contract with your reply," refer to the contract of sale in question, which was enclosed in a letter and was the only enclosure in it.

Now in our case, on September 8th, when the broker sent the broker's memorandum, that was enclosed in a letter, and it was the only letter, the only contract that was referred to. And when the testimony was given, there wasn't any other contract to refer to.

"Don't ship," the directions to cancel this car of sugar. "Don't ship any sugar until we advise you." That refers to the sugar embraced in this contract. For Plaintiff did not [297] have any other for delivery of sugar to the defendant. And it says, "These letters are the clear recognition and adoption of the terms of the contract and the acknowledgment by defendant that it was bound thereby." Now that is mere child's play compared with what the defendant did in this case.

And one case from the Supreme Court of the United States, which we quote:

"We agree with the Supreme Court of Colorado that in the face of this evidence produced by the defendant himself, he cannot deny the validity of the agreement. His letters are a clear recognition of it. In them he refers to the agreement again and again. He declares his intention to adhere to it and to hold the Plaintiff to it."

Now then, if the Court please, here we have these facts pertaining to this transaction—the broker's memorandum, I mean, which is a customary method of doing business. The receipt—no dispute as to the receipt. The retention of it. And the recognition of it, time and again.

Now how are we going to get away from that? I mean, it's the law! And so far as one other case that I would just like to call attention to, a recent California case regarding the necessity for a contract, a formal contract to be executed, it is a question of intention, and the intention of the parties is to be gathered from their conduct. And this case, if the Court please—I don't know whether I [298] have cited this in my brief, I may have done so—is the case of *Gibson vs. De Lasalle Institute*, 66 Cal. App. 2nd, 609. Now in that case, if the Court please, the wires between the parties were to the effect that a contract was to be executed. I mean, they were wires and they had the words to that effect. And when it came before the Court, that contention was urged. Well, there couldn't be a contract, because no formal contract was executed. That was what they said. But that doesn't apply in our case, because it recites in the broker's memorandum that this is to be the final contract. In this case between the parties, both of them, there is to be a formal contract. And regarding that the Court said:

“It is said in 17 *Corpus Juris Secundum*, 391, that whether an informal agreement, which, according to the understanding of the parties, is to be re-

duced to writing, takes effect as a complete contract at once, or only when a formal written contract is executed, depends upon the intention of the parties, as construed from the facts of a particular case. In *Thompson vs. Sherwin*, 65 Cal. App. 2nd, 432, this Court held that where the parties agree upon the terms and conditions of a contract with the mutual intention that it shall thereupon become binding, the mere fact that a formal written agreement to the same effect is thereafter to be prepared and signed, does not alter the binding validity of the original contract, [299] and that whether an oral agreement should take effect forthwith as a completed contract depends upon the intention of the parties, and that such intention is to be determined by the surrounding facts and circumstances of each particular case.

Then quoting from another case, the Court says: "The Court held that Defendant's letter was an offer that Plaintiff's reply was an acceptance, and it considered the subsequent conduct of the parties shown by parol evidence as indicating that both parties supposed that a contract existed."

Now then, if the Court please, the facts in this case, I mean, their subsequent conduct and what transpired here, and it is just unavoidable, shows conclusively that there was a recognition of the contract, a promise to perform it, a promise to deliver under it, and that that continued repeatedly until the 16th of November, 1956. Now I don't know what could be more conclusive. There is no conflict in the evidence. If the Court is satisfied on that

point, I will turn to the next point that is raised, and that is, custom, that has been urged here.

Now then, nothing could be clearer than that that there is and has been for years and years a well-established custom of the trade that regular apricot kernels cannot be a lot of broken kernels, but, on the contrary, they may not have more than five per cent broken kernels by weight. Now then, there wouldn't be regular apricot kernels or delivery [300] of regular apricot kernels unless that is true. Now then, sometimes that is expressed in the contract. In the case of California Packing Corporation, they make it a practice to express it. But always it is a part of the contract. Mr. Elfendahl said so, and—what was the name of Calpak's man? Mr. Engell. Mr. Kaplan. They all testified establishing that. And the contracts are in evidence showing that sometimes it is included, sometimes it is not included. And when it comes to whether it is for a delivery under it, with a certificate, they can't get a certificate of regular apricot kernels unless they are in compliance with that.

Now then, when Mr. Kaplan or the plaintiff in this case bought regular apricot kernels, nothing was said about the percentage of broken kernels that was going into the delivery. This might have been, this was the first transaction, let us say, of the sale of regular apricot kernels by the defendant. But that didn't mean that they weren't familiar with the business. It didn't mean that they could go into the trade and sell regular apricot kernels at the price prevailing for regular apricot kernels,

that everyone was buying and selling regular apricot kernels, and assume to indulge in that market, in that business, and then come in afterwards and say, "Well, regular apricot kernels may be understood in the trade as being unbroken to an extent of not more than five per cent, but I didn't know that; therefore, you didn't prove that I [301] knew it, therefore, I am not bound to it, and therefore, the contract isn't a contract, because I didn't know about it."

Now then, if the Court please, when someone goes in, if I go into the market and I sell tomatoes, and if there is a custom of the trade, we will say, that in a delivery of first grade tomatoes, there can't be a greater percentage of rotten tomatoes, we will say, or overripe tomatoes, than a certain number, and if I go in and engage in that trade, I can't thereafter come back to my buyer and say, "Oh, I didn't know about how many rotten tomatoes I could deliver to you." I mean, there is nothing,— "I didn't know about that first class, what was the custom of the trade; therefore, I am not bound by it." That isn't the law, if the Court please, and we quote the California case which is directly in point upon it. I will just read from this case of *Miller vs. Germaine Seed Company*, 193 Cal., page 62, at page 69 and 70. Quoting:

"The rule that a person will be presumed to have contracted with reference to a general custom or usage, whether he knew of that custom or not, has frequently been invoked. In *Steigman vs. Joseph Leigh Company*, 234 Illinois, 84, Northern 640, it

was said: 'A person entering into a contract in the ordinary course of business is presumed to have done so in reference to any existing general custom, usage or custom relating to such business, and this is so whether he knew of the custom or not,' " and giving various authorities. [302]

I also cite the case of *Pasterino vs.*—

The Court: What facts were dealt with, what was the reasoning?

Mr. Eisner: The reasoning, they claimed they didn't know about the custom, and it was held that whether you know about it or not—

The Court: Was there any substantive law in the State of Illinois in relation to that?

Mr. Eisner: This was not, that last quote was not from Illinois, that last quote is from—and this is so whether he knew the custom or not, that's the statement from the Supreme Court of the State of California, citing various authorities.

Then I cite also the case of *Pasterino vs. Reen Brothers*, 90 Cal. App. 2nd, 841, in which the defendant contended that he went into the fisheries, did some business in fish, and he contended that he wasn't bound by the trade custom because that was his first venture in the fish business. The Court said, "Oh no, you can't go into the fish business and plead ignorance of the custom. Why, you can see how absurd it would be, if the Court please, if anyone could assume to go into a—here Mr. Sternau comes to New York with a sample and says, "Here I am going to sell the apricot kernels, you can buy them.

What's my price? Well now, my price will be competitive. I will wait until the opening prices, and my prices will be competitive with the opening prices." [303]

And then he makes a sale of regular apricot kernels and then, can he say that, "Well, regular apricot kernels as understood in the trade (and we interpreted it, of course,) I haven't any answer to that"—is that they shall be of a limited percentage of broken kernels, because broken kernels can only be used for certain purposes. Can he say, "But, my friend, I didn't know about it, and you can't prove it. You can't prove that I knew." Why, it would be just absurd for that to take place.

Then, if the Court please, the facts in this case are so clear that the defendants knew of this custom. In other words, what would be a natural thing to do when he receives the letter of September 8th from Prince, Keeler saying that "Here the buyer says that this is the regular custom of the trade. He said that he didn't mention it before because he assumes that if you had a formal contract, you would include it." Now if a person didn't know about it what would he do? The first thing that he would do, he would go out first to verify the fact, find out whether or not this statement of the buyer was a true statement, and therefore I asked Mr. Sternau when his deposition was taken, and I asked him upon the trial, "When you got that letter, did you make any inquiry to find out whether that was a true statement, that it was the regular custom of

the trade?" "No." Now then, "At any time subsequently did you raise any question about [304] it?" "No." But he recognized this contract after that statement was made, time and again.

And then, if the Court please, I thought it was startling. I didn't expect such an answer. But I asked this defendant upon the stand, I mean, "Have you ever bought regular apricot kernels?" Why, I meant this firm. I don't care what Mr. Sternau individually knew, he isn't the corporation, he isn't the entity. But here is a corporation, the Plaintiff, that for years was in the business of buying regular apricot kernels and manufacturing them into paste. They didn't have to go outside of their own records. They didn't have to go any place at all to ascertain that. They didn't have to ring up California Packing Corporation. They didn't have to ring up Rosenberg Brothers & Company. They didn't have to ring up the California Prune & Apricot Growers Association, to find out whether this was an established custom, and whether or not it was a part of every contract of sale that was made. They knew it, if the Court please. And they never raised any question about it, and there never was any question raised about it until it was raised by the ingenuity of counsel.

Now then, if the Court please, counsel has cited a number of cases. I didn't answer all those cases, and I have this reason for saying so. I received his brief, I didn't see it until Thursday. The case was on the calendar for Monday [305] for argument. I

wanted counsel to have my reply over the week end, so I prepared in one day, and my reply brief was prepared on one day and served upon counsel on Friday preceding the Monday. So there are some—it isn't as detailed as it might have been.

The Court: Well, I will give you another week following that.

Mr. Eisner: Well, I mean, I am presenting it now, because there is no—yes, you did give me another week, that's right, following that. And for oral argument. And I feel that I could cover it in oral argument without a further written memorandum.

Now all that counsel—counsel, I mean, hasn't cited authority to the contrary of this, that where one indulges in a trade where there is a general and a well established custom, that he is not bound by the custom of the trade. Counsel suggests that custom is a matter of interpretation and not adding to a contract. We are not adding to this contract, if the Court please. We allege in our complaint that the meaning of regular apricot kernels—we are interpreting that,—is, according to the well established custom of the trade,—regular apricot kernels means apricot kernels in which there is a tolerance of not exceeding 5 per cent by weight of broken kernels.

Now this same case that I have referred to, this Gibson [306] case, if the Court please, also refers to the custom.

“When there is a known usage of the trade, persons carrying on that trade are deemed to have con-

tracted in reference to the usage unless the contrary appears. (It is up to them, in the instant case, details such as storage, place of delivery, transportation, and the like, mentioned by the trial court, are matters either governed by the usages of the business or subject to proof by parol. Absence from the memorandum of provisions therefor is not fatal to Plaintiff's case.)"

Now, then, if the Court please, this is an instrument of interpretation, because what are regular apricot kernels? We say that regular apricot kernels, according to the custom of the trade—a delivery of apricot kernels—are kernels in which there is this minimum tolerance, or rather, maximum tolerance of broken kernels. So if the Court please, there can be no question but that under this well-established custom, and the unusual part of the thing is that there isn't any—counsel couldn't produce a single witness, just mark that, if the Court please,—we produced, your Honor asked at the beginning how many expert witnesses are you going to use here in this case, and I said, "We will use two." I could have brought a dozen, if the Court please. I could have brought the Dried Fruit Association of California, the secretary. I could have brought any number of them. [307] But I brought two who I thought were outstanding representatives from the California Packing Corporation and Rosenberg Brothers. Now don't you think that if there was one witness—I don't care where—who could have testified that that isn't a regular estab-

lished custom of the trade, and that it isn't a part of the contract, even whether it is expressed or unexpressed, that they would have had witnesses here for that purpose? But they couldn't produce one.

Now, then, they are trying to indicate a discrepancy, relying between Mr. Engell's testimony and that of Mr. Kaplan's and Rosenberg Brothers. I said, well, so far as California Packing Corporation is concerned, the California Packing Corporation expresses it in its contract. Yes, Mr. Engell said, it is their practice to express it. But Mr. Engell also said, and if the Court will read his testimony, that in all instances, in every case of regular apricot kernels, it is also a part of the contract and understood that there is this tolerance respecting broken kernels. He testified too, respecting the practice of the Dried Fruit Association of California, which is almost conclusive in itself, if no delivery of regular apricot kernels will be certified as a delivery unless it is within that tolerance. And he didn't know about the others. He thought that others followed the same practice. That was as far * * * but all he knew was his own. He didn't know about Rosenberg, he didn't know [308] about others. But we have established by Rosenberg Brothers, by Elfen-dahl, we have established by the broker's memorandum from Mayfair Packing Company, from Sewell Brown & Company, from the Prune & Apricot Growers Association, that this is not always expressed. It is implied. But it is always a part of every contract. In other words, this tolerance.

Now then, when Mr. Brown, of Sewell Brown—of Prince, Keeler, Mr. Sullivan—told Mr. Kaplan that Mr. Sternau had sent on this contract, and Mr. Kaplan asked, “Well, I would like to have it included, this provision, have it expressed in it,” that didn’t mean that there was any waiver, I mean, or that usage or custom was done away with. It was expressed in the California Packing Corporation contract. It was expressed—it wasn’t expressed in the Rosenberg contract, but they were buying regular apricot kernels, and that was something that was a well understood product, and they were being charged for regular apricot kernels.

Now then, the Court has said that, well, this wouldn’t have occurred if there hadn’t been a fire. Well, if there hadn’t been a fire, I mean, very probably, first of all, Sunset-Sternau wouldn’t have sent the letter of the 28th and tried to get out of the contract. If there hadn’t been a fire, they would have delivered.

The Court: If the fire hadn’t occurred, you and your associate here would be out of a job. [309]

Mr. Eisner: Well, that’s very true, that is very pathetic. But the fact was that when this fire occurred, the first day following it, practically, the defendant in this case wanted to get out of this contract. Now then what did Mr. Kaplan do? Came out and still they could be purchased, then, for 28 cents a pound, and he purchased apricot kernels for 28 cents a pound after the fire. And then he contracted the defendant in this action, and what did the defendant say? Because the defendant said, “Yes, I

am going to deliver to you, I am having cracking difficulties."

Mr. Kaplan said, "Maybe I can help you."

"I wish you would help me."

"All right, I will see what I can do."

He gets the California Packing Corporation to agree to do the cracking.

Now that isn't only Mr. Kaplan's testimony; your Honor will remember that Mr. Engell upon the stand testified that they were waiting to hear from Mr. Sternau, but they never let them hear from him. He was only going to deliver—he was arbitrary here—if Bonzi delivered to him. And the mere fact that Bonzi did not deliver to him, I mean, is not an excuse, and I quote from the authorities there, and I don't know as your Honor needs authorities upon that point, that the mere fact that someone who makes a sale depends upon somebody else to make delivery to him, as the source of supply, is [310] not any defense. As a matter of fact, it is something that should be stricken and disregarded. I think, I hope I have covered all of the points and the elements of estoppel, if the Court please. I think I have covered that too.

The Court: We will take a recess now.

(Recess.)

Mr. O'Connor: Your Honor, I must say that I think that the points that he has made, Plaintiff has made the most of. However, there are certain points which have to be answered, and which have not been answered either by counsel or by the cases he has cited.

Now so far as the Defendant's position in this case is concerned, there has been no controversy, there has been no answer to the authorities that I cited in my brief to the effect that where the parties to an action in negotiations contemplate the signing of a formal agreement, that there is no contract until the formal agreement is signed. I have cited, as I referred to this morning, the case of *Spinney vs. Downey*, at 108 Cal. 666, which has been cited time and time again, and I have cited numerous cases that follow the rule of *Spinney vs. Downey*, where the Court held, in that case, that when it is part of the understanding between the parties to a contract that the terms of the contract are to be reduced in writing, and signed by both parties, the assent to its terms must be evidenced by the signature of both parties or [311] it does not become a binding obligation upon either. Especially where the proposed contract contains reciprocal stipulations and covenants upon the part of each party as a consideration of the acts of the other.

I respectfully submit, may it please the Court, that prior to September 1st and on September 8th, when Prince, Keeler wrote to the defendant in this case returning their formal contract, that both parties at that time contemplated that there should be a writing between them. On the one hand, the Plaintiff wanted the sales memo changed to include the 5 per cent clause.

Mr. Eisner: Just a moment, counsel. Not the sales memo. There is no mention of that. Much as

I—excuse me for interrupting, because I won't have an opportunity to reply.

Mr. O'Connor: Yes. Well, I am referring, counsel, to exhibit, I think it is, 10. I think we all understand each other. It is the Prince, Keeler note. I referred to it repeatedly as a note. This is dated September 1st. Mr. Kaplan on September 8th contemplated that that note would be amended to include the 5 per cent clause.

Mr. Eisner: Counsel, there is nothing in the evidence on that, and it is contrary to the facts. Excuse me for saying so.

Mr. O'Connor: Well, I think you are wrong, and I rather resent the statement, counsel. [312]

Mr. Eisner: I know I am not.

Mr. O'Connor: Just a moment. The evidence will be the best answer to that, if the Court please. I will read the confirmation of my statement, and I don't try to make misstatements.

Mr. Eisner: What exhibit are you reading?

Mr. O'Connor: Exhibit 10. This is a letter of September 8th, may it please this Court: It reads as follows:

"Mr. Kaplan of American Almond Products, Inc. phoned today to advise that two 100-pound bags of apricot kernels were received and found satisfactory with one exception: The broken kernels far exceeded the normal tolerance."

And went on to say, "We advised him that we were mailing your formal contracts No. 2023 (which is Exhibit No. 9 in evidence), received today. How-

ever, during the discussion, he advised that he had overlooked the following standard clause: 'Merchandise not to exceed 5 per cent by weight of broken kernels,' and requested that we add this on our contract and returns your for the same addition."

That certainly, if the Court please, is a contemplation by the parties that there will be a formal contract in line with the Spinney case.

Now reading on, "He advised that all his regular suppliers, Calpak and Rosenberg, insert this clause which is a recognized condition of sale for this particular item [313] (not custom). It was not brought up before because he assumed it would be included as a matter of course in your contract. We are therefore returning your contract 2023 as enclosure and will appreciate your authorizing the addition of the above clause in compliance with the buyer's request." That happens to be in evidence, if this Court pleases, as corroborative of the fact that the plaintiff himself, contemplated a written contract; as corroborative of the fact that the defendant contemplated a written contract, we have exhibit 9, or rather, exhibit C,—it is in on both—which is the formal contract. Excuse me. Now, it is Exhibit 9, your Honor. That referred to still another contract. Exhibit 9, which was the formal contract 2023, referred to in Plaintiff's exhibit No. 10. The contract of the defendant, which the defendant in the normal course of business upon the receipt of a sales memo, which we described, the exhibit No. 9,

the one prepared by Prince, Keeler in which the Plaintiff is relying upon as a formal contract,—

The Court: I didn't follow that clearly. Exhibit 8—what is it?

Mr. O'Connor: Exhibit 8, your Honor, is the bought and sold note which is alleged and pleaded to be the written contract in this case, and to which is to be added by trade and custom, which they pleaded, the 5 per cent clause. [314]

The Court: Read it, read it.

Mr. O'Connor: Now this is the bought and sold note. It is on the stationery of Prince, Keeler & Company. It is sold to American Almond Products Company for account of Sunset-Sternau, and shipment and so forth, of the regular apricot kernels, 175 tons, 100-pounds bags, containing the arbitration clause and other clauses which we have previously discussed, your Honor. But this is the sales memo that is referred to in Exhibit No. 10. When Prince, Keeler says, "We are therefore returning your contract No. 2023 (which is exhibit No. 9) and will appreciate your authorizing the addition of the above clause in compliance with buyer's request."

Now obviously the plaintiff in this case contemplated a written contract by his instructions to Prince, Keeler on September 8th. Obviously also, from the testimony of Mr. Sternau, from the fact of previous dealings between these very parties themselves, a formal contract in writing was contemplated and none was ever entered into, because the defendant found out it could not comply with that

condition. It was the first time such a condition, or as has been termed here, a trade custom, had been referred to. They knew of it?

Now, if that is so, then the case of Spinney vs. Downey, cited in defendants' brief, followed by a number of cases upholding the doctrine of that case, are controlling. Those cases have not been answered. The holdings in those cases [315] and their application to the present case have not been answered by the plaintiff in this case, for the very good reason, I think, that because of the evidence put in in this case by them themselves, the writings of the parties, the broker, there is no question of doubt but that a written, formal contract was contemplated, regardless of whose fault it was that it wasn't entered into, and regardless of any writings.

It was never done.

Now, your Honor asked the question about the authority of the broker, what authority does a food broker have. I think I can answer that. Of course in this case I think the plaintiff has to take the position that Prince, Keeler, the food broker, was the agent of the defendant for the purpose of binding the defendant Prince, Keeler. Such is not the fact so far as food brokers are concerned; strangely enough, may it please the Court, there aren't too many cases on food brokers. We get the usual run of cases, real estate brokers and their authority must be in writing and so forth, under the statutes, the specific statutes in the State of California.

But there are very few cases on food brokers. We

have in California the case of *Ryan versus Walker*, which I have cited, at 35 Cal. App. 116, where a food broker has been defined to be a middleman whose business is to bring seller and buyer together.

And then quoting from 12 Cal. Jur. Supplement, page 10—or *Corpus Juris*, pardon me—at *Corpus Juris Secundum*, Page 10, [316] Section 6, we find the following language:

“Except to the extent that he acts as agent for either party, a broker, strictly speaking, is a mere middleman or negotiator to bring the parties together to form their own contract. Except to the extent that a broker may be employed to act as the agent of one of the parties, as explained past in Section 14, he is, strictly speaking, a middleman or intermediate negotiator between the parties, and his duty is merely to bring the principals together to negotiate with each other for the purpose of making a contract or to find and produce a purchaser or seller, able, ready and willing to accept his client’s terms, or to effect a transaction with his client upon any terms satisfactory to both; or if so authorized, to make the contract for them.”

I respectfully point out that in this case there was not one iota of evidence that Prince, Keeler were ever authorized to bind the defendant *Sunset-Sternau*. To the contrary, the statement in Plaintiff’s Exhibit 10, “Will appreciate your authorizing the addition of the above clause,” indicates a limitation of their authority.

Exhibit No. 26, which is dated October 26, 1955, likewise, if the Court please, states in the words of Prince, Keeler [317] that they are limited, their authority is limited and they can't bind the defendant.

Now added to that is the fact that they never purported to bind the defendant at any time in this case.

Question: What is their authority? Did they have it in writing?

The answer is, no, there isn't one iota of evidence; the evidence is to the contrary. There isn't an iota of evidence that Prince, Keeler ever had the authority to bind the defendants. And that lack, if the Court please, is a fatal defect in the plaintiff's case.

And I read from a case—I must beg the indulgence of the Court, because while we look for authorities to substantiate our position, we can look and look and we don't find them all at one time. I did find this one, very frankly, last evening, when it was too late to read it, and I did so this morning.

We have a case, which I think is on all fours. Particularly where, as here, the defense of the statute of frauds was pleaded, we think we have a case here, Georgia Peanut Company versus Fabel Products Company, reported at 96 Federal Reporter 2nd Series, Page 440, decided by this Circuit Court.

The Court: What is the date?

Mr. O'Connor: The date of this, if the Court please, is April 29, 1938. [318]

The Court: '38. Who wrote the opinion?

Mr. O'Connor: The opinion in this case was written by Denman, concurred in by all other judges: Denman, Matthews and Healey.

The Court: That is our Circuit here.

Mr. O'Connor: Yes, this Circuit, your Honor.

The Court: Very well.

Mr. O'Connor: In this case, and I——

The Court: What is the factual situation, first?

Mr. O'Connor: The facts of this case were as follows, your Honor:

The two parties to the action, through a broker, arrived at, there was a memorandum of sale of peanuts signed by the broker, the same as in this case, and the plaintiff who brought the action for damages claimed that the broker acted as representative of both parties and that the broker's memorandum was binding upon both.

The Court rejected it; it was tried in Los Angeles before Judge Yankwich. The defense was that there was no meeting of minds and there was no meeting of minds on the contract and that the alleged broker was in fact merely the agent of the appellant seller and hence its signature was not that of an agent of the buyer.

The statute of frauds was invoked in this case, the same sections identically as are invoked by the defendant in this [319] case, including Section 2039.

The Court stated:

"It is not necessary to resolve this dispute, since we regard it as controlling that the price of the

peanuts was \$18,450 and that there was no written authorization from the buyer to the broker. The buyer is the one sought to be charged. For the purposes of this decision we are accepting appellant's contention that the claimed broker was in fact the agent of both parties in signing the memorandum of sale, that is, only for the purpose of discussion, and that had it been properly authorized, the contract would have been valid. California Civil Code 1624, subdivision 4, as amended, provides what contracts must be in writing."

That is the ones we pleaded here, the identical language, Code Section also of 2039, which we are relying upon in this case.

Now it says here:

"The appellant contends that there is an exception in the California law of a brokerage transaction from the provision of Section of Civil Code 2309 and that a broker occupies a status in which his authority to act as such may be proved by parol."

And Section 2309 reads: [320]

"An oral authorization is sufficient for any purpose except that an authority to enter into a contract required by law to be in writing, can only be given by an instrument in writing."

The Court says:

"No California cases cited show such an exception, but what is clearly the plain provision of the Code section, that the authority of any agent, including brokers, to execute an instrument, required to be in writing, shall likewise be created in a written instrument."

It goes on to state, to distinguish certain other cases which didn't have these statutes, and where no statute was referred to.

Then it says further:

"In our opinion the provisions of the California Code sections are subject to but one interpretation, that is, that everyone exercising an authority to sell or buy, save the specially excluded auctioneer, which is the exclusion in California, whether a broker or any other class of agent, must have written authority to enter into a contract required to be made by him."

Now they characterized then a broker in the same fashion that the Ryan case classified him, as a mere middleman, a [321] negotiator to bring the parties together, and I think the evidence is conclusive here that Prince, Keeler was doing exactly the same thing.

If they weren't would Prince, Keeler have returned the contract that the defendant sent them, or would they have just inscribed across there the five per cent clause? Would they have asked for authorization to include the five per cent clause in the so-called memorandum of sale agreement, which is Plaintiff's Exhibit No. 8 in this case, the so-called bought and sold note?

Mr. Eisner: They didn't ask that, counsel. They didn't ask that.

The Court: What's that?

Mr. Eisner: They didn't ask authority to include it in that broker's memorandum. I mean, they

asked authority to include it in the 2023, which was the contract, the formal contract that Sunset-Sternau were sent.

Well, I am sorry to interrupt.

Mr. O'Connor: That's all right. I will resolve it, if there is a question as to any statement of mine, counsel. I had it here just a moment ago, your Honor.

The Court: What is it you wish?

Mr. O'Connor: Plaintiff's Exhibit No. 10. I had it here just a moment ago. Maybe I have got it over here.

I just had it here and I misplaced it among all these [322] papers. I just finished reading from it.

The Court: Well watch counsel on the other side.

Mr. O'Connor: Oh, I have it here. It went under the heap.

Now, in this letter of September, Plaintiff's Exhibit 10, which counsel questions my statement on, Sullivan of Prince, Keeler and Company says that the following standard clause, "Merchandise not to exceed five per cent by weight of broken kernels," had been requested to be inserted in the formal contract, and then he goes on to say——

Mr. Eisner: Formal contract is the 2023.

Mr. O'Connor: That's correct.

Mr. Eisner: No, the memo.

Mr. O'Connor: "And requested that we add this on our contract, and return yours for the same addition." That's what it says.

Mr. Eisner: I mean that's——

Mr. O'Connor: "Now we are therefore returning your contract 2023 as enclosure and will appreciate your authorizing the addition of the above clause in compliance with the buyer's request."

Now, they are enclosing the contract 2023 for the addition, Kaplan has asked that there be added to this note the five per cent clause, and they are asking for authorization.

I think it is rather plain from the letter. [323] I don't think, maybe I interpreted it wrong, but I certainly think it is there, and I think it is there in very plain language.

Now the latter case which I cited I think to be controlling. In other words, this Circuit Court has found there is nothing mysterious or strange about 2309, the Civil Code of the State of California. It says that all these contracts required to be in writing, the authority must be in writing. There isn't any authority in this case to Prince, Keeler to enter into any contracts.

Now if that be so, there has never been a written authority given by the defendant Prince, Keeler. And if that be so, then, question: Where is the contract of September 8th relied upon by counsel? Is it a complete contract? They have the authority, they could have put the clause in. They didn't. They asked for authority to do so. They returned the contract.

Now we come up to some of the cases cited, and I would like to review for your Honor the cases cited by counsel.

He cited the case of Thomas Henderson Company versus Barron, 163 New York Supp. 697, as authority that a note such as this, in New York, a bought and sold note, such as Plaintiff's Exhibit No. 8, is sufficient. It must be borne in mind, and counsel will admit, that New York State does not have the same, or did not at that time have the same statute of frauds that we did, so therefore that question wasn't at issue.

But the Court in that case—— [324]

The Court: Pardon me. What was the difference?

Mr. O'Connor: The difference in that case is that they had no statute of frauds in New York State.

The Court: At all?

Mr. O'Connor: No.

Mr. Eisner: No statute of frauds?

Mr. O'Connor: Not so far as that case is concerned.

Mr. Eisner: Oh, come, counsel.

Mr. O'Connor: Here's what happened in that case.

The Court: I don't follow that theory. Develop that.

Mr. O'Connor: In the Henderson case, decided in, I think, 1917, the turning point, my notes show that there was no statute of frauds in existence there, as there is in California. I don't think I am wrong. You can take me up on that later, counsel, if you don't mind.

In that case, though, to get the facts of the case,

the appellate court ordered a new trial and the new trial was ordered on the basis that certain evidence was excluded which would have attempted to show the broker's authority to bind the defendant.

The trial court had excluded that evidence and it held for the defendants.

The appellate court said that that evidence should not have been excluded because—and it went on particular to say that where the broker mailed out a broker's note in [325] connection with this sale, that it constituted a valid contract of sale—that is, so far as New York State is concerned.

There was no judgment on the merits in that case.

It differs here. We are deciding this case on the merits. There isn't any appellate question as such on procedure or upon evidence.

Now counsel has cited the case of Moore versus Day, a California case, in which there was the situation factually far different from the present case. In that case the Court found that Gilligan, a broker, was in fact the agent of the appellant, that he was in fact the agent; that the broker for many years had purchased——

Mr. Eisner: You have your cases mixed there. Moore versus Day is the case of estoppel. In that case you must be referring to something else.

Mr. O'Connor: Well, it comes under the term of ratification. I have gone on, I have allowed the other points to go, counsel.

Mr. Eisner: Well, I mean you just have the

wrong case. That is, Moore versus Day is another kind.

Mr. O'Connor: Moore versus Day, 123 Cal. App., counsel?

Mr. Eisner: Yes, it is 123 Cal. App. But that was the case of estoppel.

Mr. O'Connor: I am taking them in the order that you cited them, counsel. This was on ratification and estoppel.

Mr. Eisner: Well, ratification is one thing.

Mr. O'Connor: It is on both and my notes show that you referred to them in both phases of it.

In that case the Court found that one Gilligan was a broker, and was in fact the agent of the appellant. The actual evidence was, they found from the evidence that he was an agent, and that for many years he had purchased beans for the appellant on a commission basis, the custom being for the appellant to advise the broker how much he would pay for a certain quantity of beans, and if the terms were satisfactory, Gilligan would obtain the written contract for sale and purchase.

Respondents were fully familiar with the practice of executing a written contract covering transactions entered into with a broker through his agents. The Court also found in this case that the buyer said he would accept the beans.

They also found that the terms of the contract were complete and both parties in accord, and both parties capable of completing the contracts.

That is not true in the instant case, because on

September the 8th, there was a condition: "I will accept" say the plaintiff, "if you put that five per cent clause in and deliver accordingly."

The defendant upon receiving that information finds out [327] that it can't confirm and doesn't give the authority to amend the contract to send it back, either to send back its formal contract, or to allow the broker to insert it as part of the document, our Exhibit 8 here, the bought and sold note.

Now we have another case cited on ratification, Franklin versus Edgerton.

Now in that case, that is 288 Fed. 698, the terms of the contract were complete in the writings as to price, quality and delivery, which was the last, I guess, to the seller. In other words, the date of delivery was left somewhat up to the discretion of the seller. The Court held that the defendant's contention that the contract was uncertain as to price and quality was not true, that the letters between the parties, interpreted in the language of the particular trade, definitely fixed the price and quality, and that defendant fully understood the trade terms used.

Now in that case they used symbols—sugar was known by certain symbols, and the price and quality and so forth. And it found that both parties had long been in the business, and that the defendant, who sought to be charged in that case, well knew what the trade terms were, and interpreting the written terms of the contract, there wasn't any question of any additional clauses by trade usage

and custom, or trade usage and custom, being used to interpret the terms actually used between the people. [328]

It differs from the present case in that trade custom is sought to be attached, an attached clause or condition of a contract at a particular time.

Now the case of Franklin versus Mullin was cited, and this is an interesting case. The Court again invoked the parol evidence rule to use trade custom and usage to interpret the meaning of the words of the contracts.

Again the same firm was involved, Franklin. But trade custom and usage was not used to add a term or condition to the contract. The Court, and I quote from that case, said:

“In the present case we are not writing into the contract something that is not in it, but we are finding the meaning of the terms used in the contract, which presumably were placed there by the parties because they meant something, and to each of them we are bound to give force and effect under the familiar rules of construction.”

They weren't attempting to add anything. In this case there is an attempt to add by trade custom and usage a clause as of September 8.

In the case of Howell versus Whitman Schwartz, cited by counsel, we have essentially the same situation that existed in the two previous cases. All the terms of the contract were agreed upon in the exchange of letters between the parties, although no formal contract was signed. [329]

That's not true here; there is an essential part of that contract, the terms of the defendant's contract and the inclusion of the five per cent clause. There was never any agreement reached on it.

In the case of Beckwith versus Talbot, cited by counsel, 95 U.S. 289, which is a rather old case, all of the terms of the contract again were referred to specifically in the letters between the parties. There was an entire agreement upon it, and the Court enforced the contract.

Now so far as custom and usage is concerned, if the Court pleases, those are cases cited by way of ratification by counsel, but they do enunciate for the most part the doctrine of the use of trade custom and usage as a means of interpretation, not as a means of adding to contracts.

Now counsel has cited two cases under trade custom and usage which he says apply to the present case. One is Miller versus Germaine Seed Company. Now that case involved the purchase of seed by the plaintiff by the defendant. The seed turned out to be different from the specific type requested. The plaintiff sued for damages for breach of warranty. Now it was proved in that case that both parties had long been in the business, were fully familiar with the terms of the business and the warranties, and ordinarily in that type of thing, a Civil Code section in the State of California applies, applying a condition of warranty, the purpose for [330] which it is purchased.

In this case, custom was proved among the trade, that that warranty provided by the Civil Code of

California was not part of the contract between the purchasers and sellers of seed, because they couldn't warrant. For some reason within the trade, and reasons best known to themselves—technical reasons.

The Court held that the trial court should have given an instruction to the jury, in the light of evidence produced by the defendant, to the effect that in the sale of seed, there is a general and universal custom and usage of the trade that seed is not sold on warranty.

That's the decision on appeal in that case. And the Court did say just prior to the quotation of the plaintiff, that the plaintiff put in, that:

"To be regarded as part of a contract, however, the usage or custom must have both of the foregoing elements, that is, custom not inconsistent with the contract, and of such general and universal application that a person is conclusively bound by it.

- (1) It must be actively or constructively known;
- (2) It must be consistent with the contract."

Now in this case, may it please the Court, the evidence and the undisputed evidence, the admissions of the plaintiff himself, Mr. Kaplan,—I am saying the plaintiff in that [331] sense—show that the defendants were new in this business. The attempts to bring them in through their making paste some ten or twelve years ago is rather a fallacy, because, as Mr. Sternau testified, he was merely a salesman, he had no charge or part of the business. His brother, who died in 1947, conducted that business, and his father before him. A Mr. H. S. Rich-

ards, following his brother's death, conducted the business. That man has since retired. He had conducted the business and Mr. Sternau was merely the salesman for the company.

Now the Court said in this case that that must be known, and it wasn't known to Sternau, to the defendant in this case, until it was called to their attention by the letter of September 8th, and that was the first time it was known. And then we have the very interesting situation developing where the plaintiff himself insisted, not in reliance upon the trade custom, but insisted that it be made a part of the written contract, the contract that was to be written and formalized between them.

Now, citing from the case of Robertson versus Dodson, 54 Cal. App. 2d 661, the Court said that a person is not bound by a custom or usage unless he had actual knowledge thereof, and it is so general or well known in the community as to give rise to the presumption of such knowledge. And then in the same case: [332]

"Custom and usage may be used as an instrument of interpretation, but may not be used to create a contract."

And I have cited that case in my brief.

In the Security Bank versus Southern Bank, 74 Cal. App. 734, the Court said at Page 749:

"A custom or usage which will enter into and affect the rights and liabilities of persons in their dealings with each other must be certain, uniform, and either known to those sought to be charged thereby or so generally known or notorious that

knowledge and adoption thereof must be presumed." That is not the case here. There was no intimation at any time up until September 8th that there was such a custom. But the custom was, or the condition, was called to the attention of Prince, Keeler by the plaintiff himself. No reliance upon it. "This we want as a condition to this contract. This we are not relying, on September 8th we are not relying upon a custom, we want it in writing."

And the testimony of Mr. Engell to the same effect, that it is customary, if the Court please, to put it into contracts. Or in the absence of it being in specifically, as in that language, to obtain a certificate which guarantees that the kernels do not exceed five per cent by weight.

The buyer can rely upon that particular certificate [333] either way. That's the way sales are consummated. That is the custom. The custom is not the unwritten custom of adding a clause to a contract so that the plaintiff can say on September 8th, "Here, we have a contract," because on September 8th the plaintiff said, "We don't have a contract. I want this in." And no authority was ever given to anyone to include it, either in the sales memo, nor did the plaintiff thereafter at any time either request the brokers in this case, Prince, Keeler to return the memo with the clause in it, or to obtain from the defendant their formal contract 2023 with the clause in it. They let it ride.

Now there is one case that was cited by counsel, and that was the Pasterini case, where a custom was alleged to be binding upon a person. In that

case, the question involved the interpretation of contract terms through usage and custom, not the addition of a clause or condition, not the attempt to add terms to a contract.

Also in that case, familiarity with the custom and usage through long previous study of the particular industry, in that case the fishing industry, was proved by the party seeking to charge the defendant.

The defendant had made a study of the fishing industry, the evidence showed, for at least six months before entering into it. And when it used the ordinary trade terms, the Court said ignorance of those trade terms could not be predicated [334] upon that evidence, because it was shown he had made a thorough study of the fishing industry before he ever went into it. The same situation is not present in the instant case, where it is a single deal made by a company engaged in other transactions.

This was the first and the only single transaction of its kind that they attempted to make.

Now we cite by way of proving that the custom insofar as pleaded and attempted to be proved is binding upon the defendant in this case, as adding a condition to the contract to make it a whole contract, that that is not binding, the case of *Sharp versus Keating*, 13 Cal. App. 2d 637, wherein the Court said:

“However, we think the law is that parties, as to a subject matter concerning which known usages prevail, by implication incorporate them into their agreements if nothing is said to the contrary.”

And I respectfully point out in this case that something was said to the contrary; that the plaintiff would not rely upon a custom, if such there be. He wanted it in the contract and he demanded that it be in there in writing. And we have Mr. Engell, his own witness, testifying as an expert, that it was customary to put them in.

I repeat, of course, that we never put in, because the defendant took the only normal course—he tried to find [335] out whether he could comply with that.

This is his first deal. And when he gets a letter saying that the sample is fine except that the tolerance far exceeds the normal tolerance of five per cent, then he has to stop and think, and he finds out from the supplier, “No, I can’t furnish you any better kernels than I have already furnished you.”

They were shelled by Continental Nut, a recognized firm in the industry. And they turned out to be far, far over the five per cent. The fact of the letters referring to a contract, by a lay person, merely an attempt in this case to complete a sale if a sale can be completed, and the terms finalized between them. But nowhere, at no time, is there a specific agreement upon the five per cent clause, nor on the part of the plaintiff has there ever been a deviation from its request that the five per cent clause be included in writing in the contract. Never. There was never any waiver of it at any time.

For these reasons, if the Court please, and for the reasons cited in the briefs in connection with the *Spinney versus Downey*, and those authorities,

I consider, number one, that never at any time has there been a contract which was binding. That it was the intention of the parties and of the evidence, the evidence of plaintiff clearly shows, and the evidence of the defendant likewise shows, that a formal [336] contract, if there was to be a formal contract, reduced to writing, — that was never done. That custom cannot be used in this case to add a condition to a writing already in existence which in itself was a contract. That the statute of frauds is available to the defendant, and that there isn't any estoppel in this case.

Until September 20th, or whatever date the fire was,—and there was some doubt as to the exact date—if there wasn't a fire, there never would have been this action, as your Honor has rightly said. And yet prior to that time and between the 8th and the 20th or 21st, the plaintiff in this case never sought of the defendant the changes, nor did it seek of Prince, Keeler the changes in these sales memos.

It wasn't concerned. because, up to that time, the plaintiff knew it was negotiating. When it served its purpose, to try and use someone else to take over its loss, then they come in with the trade custom and say, "This is our contract," when they knew, through previous dealings with the defendant and knew in this case that the defendant wanted a formal contract in writing at all times.

I will submit it, your Honor.

Mr. Eisner: I will just be about five minutes, if the Court please.

The Court: I won't be here five minutes. I don't get [337] paid for overtime here.

Mr. Eisner: Well, I will look into that.

The Court: Just a moment.

The older I get, the more patient I have got.

Mr. Eisner: I think so. I think you always have been patient.

The Court: I think you have done pretty well today. I want to select the cases that he has cited and be prepared tomorrow morning at 10:00 o'clock, and I will both sides half an hour each.

Mr. Eisner: Well, if the Court please, I was due to go to New York yesterday, or rather today. I postponed it, and I am flying to New York tomorrow. I won't be able to do it tomorrow, if the Court please.

The Court: Very well.

Mr. Eisner: I have a matter there and——

The Court: If you want to conclude, I will do the best I can with your case.

Mr. Eisner: All right.

The Court: Now.

Mr. Eisner: I will just be about five minutes.

The Court: Very well.

Mr. Eisner: Counsel has referred, if the Court please, to the case of Georgia Peanut Company versus Fabel Products Company, 96 Fed 2d, in which your Honor asked who decided the [338] case and Judge Denman and the court, and it is the case with which I am fully familiar.

Now if the Court please, that was a case in which the Court decided that although—I mean generally

in other jurisdictions, the broker's memorandum is sufficient, in the State of California there must be written authority to the broker to execute the written memorandum.

And I stated to your Honor from the beginning that that is the law in the State of California.

But in that case, in the Georgia Peanut case, if the Court please, there was no recognition, there was no ratification, and the point in this case, and the point which counsel ignores and which cannot be ignored, is the fact that there was this repeated ratification and recognition of this contract, which is in all respects equivalent to written authority in the beginning, and one is exactly the same as the other.

I am fully in accord with the Georgia Peanut case. In other words, if there were no ratification here, if there were no recognition of the contract, then it would be comparable.

But here in this case, where there is recognition and ratification, it is exactly the same as written authorization, where there is written ratification, and it is in exact compliance with that.

So we are in exact accord with that case, and we are arguing basically upon that same principle. But counsel [339] ignores the fact entirely that there can be a written ratification of the contract.

He has ignored entirely in his argument to your Honor the repeated recognition of the fact of the existence of the contract, the repeated promises of delivery under the contract; not one word has been said about that, if the Court please.

All of which distinguishes this case, and all of which brings it directly within the principle of written authorization, because there is written ratification.

Now then, counsel says we are adding a term to this contract, and therefore it is different from usage and custom. But we are not adding a term to this contract. The allegations of the pleadings are that the term "regular apricot kernels," according to a general and well established custom and usage existing among those engaged in the California apricot kernel trade, means, and meant at the time said contract was entered into, that broken kernels in any delivery shall not exceed five per cent by weight.

In other words, we are defining, in other words, just exactly as it would be if it were a symbol, when these regular apricot kernels or regular apricot kernels — what that means, that it means just exactly that.

It isn't adding a term to the contract, it is defining a term of the contract, what "regular apricot kernels" are. [340]

And that is exactly what we proved. Now the authorities that counsel has cited on the question of usage and custom, when read, are found to be just exactly in accord with what we say. He hasn't emphasized them just the same, but every one of them says where there is a general usage and custom of the trade and it is well established, they are presumed to have knowledge of it.

Now then, what more definite proof could there

be of a general and well established custom of the trade than what we have proved here in this case? Uniform custom of the trade. And according to his own authorities they are chargeable with knowledge of it and they can't plead ignorance of it.

And as I said to your Honor, when one goes into a business in which the definition of a certain article is—in which a certain article is defined, he can't plead ignorance of it when he presumes to indulge in that trade, and sell an article and engage in that trade—when he does that, he is presumed to know what are the generally recognized customs of that trade, particularly when it is a custom that defines the article and what it is.

As I said before, it would be absurd to say that anyone could sell regular apricot kernels and could charge the price of regular apricot kernels and then say, "I am not going to deliver what are generally understood in the trade as regular apricot kernels because I didn't know what regular apricot [341] kernels were."

If the Court please, something is said about a certificate. What was said about a certificate is that where a certificate is called for, I mean when these brokers' memoranda were issued, there is no certificate that accompanies them. Such broker's memorandum constitutes the contract. But very frequently, and particularly in a case of export shipment, they request a certificate from the Dried Fruit Association of California.

As a matter of fact, that is stated in one of the

letters, the letter of September 8th from Prince, Keeler and Company to the defendants.

And when a certificate is called for of quality, then the certificate will only be issued by the Dried Fruit Association when this custom is complied with.

In other words, it is such a well recognized custom of the trade that it doesn't make any difference whether it is in the contract or not in the contract, when the Dried Fruit Association of California is asked to certify to a delivery of regular apricot kernels. They don't ask, "Is it in the contract? Is it not in the contract?" But they say that if it is a regular delivery of regular apricot kernels, it must comply with this and not a more than this percentage otherwise they cannot certify to it.

In other words, if the Court please, there is nothing [342] in these authorities of defendant which is contrary to the facts; I mean in the case and the authorities generally.

And so far as authorities are concerned upon a contract having to be reduced to writing, if it is the intention of the parties, of course that is an elementary proposition of law, that where there is the intention of the parties that a contract shall be reduced to writing and that it shan't be effective until it is reduced to writing, then it has to be reduced to writing.

But that's a question of intent, and that intent is to be determined from the conduct of the parties and here in this instance the broker's memorandum which is retained by the parties recites in its very

terms that it is the contract unless a formal contract is executed and then the parties do not execute a formal contract, and time after time, months after that, and after they held that formal contract in their own files, knowing it, they recognized the contract time after time, and promised delivery.

Now there cannot be any question but that that is a recognition, and by their own conduct they show that it was not the intention that there should be, or of necessity, such a contract.

And if the Court please, I think that I have covered the points. I think if your Honor will look at this correspondence, look at the recognition under this contract, that there isn't any answer to the proposition, and counsel [343] certainly hasn't answered it, that there is a recognized contract that has been deliberately breached.

And there is just one other closing statement that I want to make.

Counsel has referred to Exhibit 16. I haven't referred to it as yet. But in this Exhibit 16, it is a letter from Prince, Keeler and Company to Sunset-Sternau, in which Prince, Keeler and Company expresses its disgust with the conduct of Sunset-Sternau in connection with this very transaction, and I will read it to you:

"Confirming, as we have, we do not have the double talk, double work, double talk and reconfirming as we have had on shelled and unshelled almonds and walnuts the past two seasons and on apricot kernels this season."

In this letter, Sunset-Sternau was trying to get

out of another contract that it made, and the broker says to Sunset-Sternau in this case, "The way for you to get out of this one is to send the buyer a sample of old crop, and if you send the buyer in this instance a sample of old crop, he will reject it and maybe you will be off the hook."

Mr. O'Connor: Just a moment, counsel.

Mr. Eisner: I will read it here; it is in evidence.

Mr. O'Connor: I will object to this, if the Court pleases. I think the intent is rather obvious on the part of counsel, to [344] prejudice the court against——

The Court: A jury is absent.

Mr. O'Connor: The jury is absent; we can speak very frankly. Here we have a firm of brokers in New York, who had very good reason to eliminate the arbitration clause in New York. And, for example in this case, as the correspondence will indicate, they were not authorized to use the arbitration clause, because we dealt with New York people.

We have some New York brokers here, where there is a constant dispute. They want to sell at any price, find the firm out here so they can make a commission. You are bound to have disputes.

And as to who is right or wrong, they have their own words here. This happens to be incidental. The part that has reference to this case is a very small part of this letter.

Mr. Eisner: Well, I certainly can refer to it. You read the letter.

Mr. O'Connor: That's right, I have read the portions that are applicable to this case, counsel.

Mr. Eisner: You think you have, counsel. I am going to read the portion that I think is, also.

Mr. O'Connor: Well, go ahead. It's merely an attempt to use outside, or evidence of some other dispute between the broker in this case and my client on another deal, where the full facts aren't before this court. [345]

The Court: Who introduced it?

Mr. O'Connor: Pardon?

The Court: Who introduced it?

Mr. O'Connor: The plaintiff introduced, and it was introduced solely for the purpose of allowing those portions which refer to this instant in evidence. The rest was excluded.

Mr. Eisner: Oh, that's not true, and——

Mr. O'Connor: Oh, certainly it is true, counsel.

Mr. Eisner: Just a moment, now.

Mr. O'Connor: You know better——

Mr. Eisner: Just a moment. I am just concluding now my argument.

The Court: We have got along nicely up to this point.

Mr. Eisner: Yes.

The Court: Read that.

Mr. Eisner: This is, if the Court please, where Sunset-Sternau entered into a contract with another concern for sale of walnuts, black walnuts, and wanted to get out of that contract. So the broker says to him:

“Just send the buyer a sample of old crop black walnuts and you will be off the hook.”

The Court: What relation has that to the issues in this case?

Mr. Eisner: It has only the relation to this case, if [346] the Court please, showing the attitude between the broker and his, what he thinks of the defendant in this case.

The Court: That's rather remote. I can't get the reasoning there.

Mr. Eisner: Well, it isn't——

The Court: What's that?

Mr. Eisner: It is simply showing, if the Court please, the thought of the broker, of the attitude of this defendant, and when he says, "We have not had the double work,"——

The Court: Maybe that broker was hard to get along with.

Mr. Eisner: "Double work, double talk and re-confirming as we have had on shelled and unshelled almonds and walnuts the past two seasons, and the apricot kernels this year." That's what they said. Now, if the Court please, I wouldn't have mentioned this, I hadn't mentioned it, until counsel mentioned this letter which I have referred to. And I think if the Court will——

The Court: Your five minutes are up.

Mr. Eisner: Very well, I will submit the matter.

The Court: Now, do I understand you are going away in the morning?

Mr. Eisner: Yes, your Honor.

The Court: How soon do you expect to be back?

Mr. Eisner: I hope to be back the end of the week?

The Court: What's that? [347]

Mr. Eisner: By Friday or Saturday.

The Court: Both you gentlemen are exhausted?
No more?

Mr. Eisner: Just about.

The Court: No more assistance for the Court at all?

Mr. Eisner: I think that we have rendered all the assistance that this Court needs. Some Courts may need more assistance, but I don't think this Court does.

The Court: Well, I want to say to you gentlemen that you have both come well prepared. You have got a wonderful record here and if you didn't do anything else, both of you fitted yourself to be able to put up a good argument in the Circuit Court if you reach there. Is that clear to you, Mr. O'Connor?

Mr. O'Connor: Yes, it is, your Honor.

The Court: So that if I happen to make a mistake here, at least with a little cost, you can go across the hall. That's the only comfort I can give you. And either one of you are bound to prevail here, so somebody has got to be disappointed.

Now, I will do the very best I can with it. Have it submitted tomorrow morning on the calendar for decision, if that is agreeable.

Mr. O'Connor: Yes, it is, your Honor.

The Court: Did you enter that in the order, sir?

The Clerk: Yes, your Honor, tomorrow morning for submission. [438]

The Court: And I shall go over carefully what

has been said and done here, and I don't know of a better way to get a that than to get a transcript of what has happened here today in this argument. It will help me.

Mr. Eisner: Would your Honor like a complete transcript? How about a complete one?

The Court: I will take a transcript.

Mr. Eisner: How about a complete transcript of the evidence?

The Court: What's that?

Mr. Eisner: How about a complete transcript of the evidence? Would your Honor find that helpful?

The Court: Well——

Mr. Eisner: Suppose we have that made, as well as the arguments.

Mr. O'Connor: Perfectly agreeable, your Honor.

The Court: Very well. Let's see.

(Discussion between Court, counsel, clerk and reporter regarding time necessary for the preparation of the transcript.)

The Court: In that event, get it out as soon as you can. In any event, we will have it stand submitted here.

Mr. Eisner: Yes, your Honor.

Mr. O'Connor: Yes, your Honor.

The Court: Or maybe it had better go over on the calendar [349] so if he gets stuck on the transcript——

Whatever you wish.

Mr. O'Connor: Might be well for the convenience of all concerned, say, by the time of the transcript, your Honor, in the case——

The Court: I want to dispose of it as soon as we can.

Mr. Eisner: It is not a long transcript, because part of it, if the Court please, a large part of the record consisted in reading the depositions. That wouldn't be transcribed, because your Honor has that.

The Court: Very well.

Mr. Eisner: It is only the oral testimony, and that isn't long. So I think that can be done very promptly.

Mr. O'Connor: I think it was all.

The Court: What day will it go over on the calendar to? I would like to hold on to these cases so that I don't get behind. The administrative office comes up and gives us a scolding on the cases. You are aware of that, aren't you?

Mr. O'Connor: I was aware of that at one time, too, your Honor.

(Conversation among Court and counsel off the record.)

The Court: Suppose I put it over two weeks.

Mr. Eisner: Yes, put it over two weeks for submission?

The Court: What date is that?

The Clerk: April 8th. [350]

Mr. Eisner: And then it will stand submitted.

The Court: April 8th for submission. What day is that?

The Clerk: Monday.

The Court: Monday, April 8th, for submission.

You know, I don't know how near you come to a settlement in this case, but unless you settle it of course that will be—my decision will without doubt go to the Circuit Court, because it should.

Mr. Eisner: I don't know.

The Court: Now, if you can dispose of this without—although you said emphatically that there was no possibility of a settlement.

Mr. Eisner: Counsel has never suggested any settlements.

Mr. O'Connor: I don't think there has been a suggestion on either side.

The Court: He indicated in no uncertain way at the outset of this case that there was no opportunity for settlement, on pre-trial.

Mr. O'Connor: On a pre-trial basis, yes, I think I did that.

Mr. Eisner: Well, of course, I am willing to stand ready to discuss the matter with counsel if he wants to.

Mr. O'Connor: When counsel returns from New York, he might—when you get back from New York, counsel, and you will be going tomorrow?

Mr. Eisner: Yes.

Mr. O'Connor: Might discuss it.

The Court: Now, is there anything else?

Mr. Eisner: I think no, your Honor.

The Court: Any way I can serve you gentlemen?

Mr. Eisner: I think you have been very patient. You have stayed here and it is a wonderful opportunity——

The Court: I encourage these things. This case is well prepared and I have a definite state of mine on it right now—subject to change.

I will go over this transcript if it becomes necessary and I think it is worthy of that, because this is a peculiar case, but I will say to you, Mr. O'Connor, if you have an opportunity to make a settlement of this case, I will have no hesitancy in saying to you, you had better avail yourself of the opportunity. That is as far as I will go.

I say that kindly.

Mr. Eisner: Thank you, your Honor, and I will be glad to talk to him.

The Court: I promised myself repeatedly I wouldn't engage in preaching, but I can't seem to refrain from it. Now the only thing I can assure both sides in this case is a proper record and help in any way I can in the event that you want to go forward.

Mr. Eisner: Fine. Thank you, your Honor.

[Endorsed]: Filed April 12, 1957. [352]

[Endorsed]: No. 15690. United States Court of Appeals for the Ninth Circuit. Sunset-Sternau Food Co., a corporation, Appellant, vs. American Almond Products Co., Inc., a corporation, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed: August 26, 1957.

Docketed: August 29, 1957.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for
the Ninth Circuit.



No. 15,690
United States Court of Appeals
For the Ninth Circuit

SUNSET-STERNAU FOOD Co., a corporation,
tion,

Appellant,

vs.

AMERICAN ALMOND PRODUCTS Co., INC.,
a corporation,

Appellee.

OPENING BRIEF OF APPELLANT.

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FILED

MAR 27 1958

PAUL P. O'BRIEN, CLERK

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No. 15,690

**United States Court of Appeals
For the Ninth Circuit**

SUNSET-STERNAU FOOD Co., a corporation,

Appellant,

vs.

AMERICAN ALMOND PRODUCTS Co., INC.,
a corporation,

Appellee.

OPENING BRIEF OF APPELLANT.

I.

**STATEMENT OF THE PLEADINGS AND
FEDERAL JURISDICTION.**

On December 2, 1955, appellee filed its complaint alleging the existence of a contract in writing between it and appellant on September 8, 1955; that said written contract provided that appellant would sell and appellee would purchase from appellant, 75 tons of "Regular Apricot Kernels"; that appellant submitted a sample of apricot kernels which was approved by appellee; that according to the custom and usage of those engaged in the California apricot kernel trade, the term "Regular Apricot Kernels" meant that

broken kernels in any delivery shall not exceed five (5%) percent by weight.

The complaint alleged a breach of this written contract by appellant because it refused to deliver all or any part of said apricot kernels; that by reason thereof appellee was damaged in the sum of \$37,500.00. (R. 6-8.)

The answer of appellant was filed January 19, 1956. It denied the existence of a written contract, denied any liability to appellee and alleged as an affirmative defense that the action was barred by the Statute of Frauds.

On May 2, 1956, after a trial on the merits was had, judgment was entered in favor of appellee in the sum of \$37,500.00.

Jurisdiction of the District Court was based upon diversity of citizenship and the fact that the amount in controversy exceeded, exclusive of interest and costs, the sum of \$3,000.00. (28 U.S.C.A. 41-1332.) This Honorable Court has jurisdiction of this appeal by virtue of the provisions of 27 U.S.C.A. 1291.

II.

STATEMENT OF THE CASE.

There is not, basically, real conflict between the parties on the facts. It is in the interpretation and application of the law of sales and contract, of trade custom and usage, of principal and agent and of the

Statute of Frauds to the settled facts that differences arise between appellant, the Court and appellee.

Appellee, in its pleadings and oral and documentary evidence adduced by it in the trial rested its case upon the existence of a written contract, the existence of trade custom and usage which became a part of that written contract, that the broker who attempted to negotiate the alleged written contract between appellant and appellee had the authority to do so and that appellant had, orally and in writing, ratified that contract and that the appellee's claim was not barred by the Statute of Frauds.

The Court below found in favor of appellee on these issues and rendered judgment in its favor.

On appeal, appellant contends that, as a matter of law:

1. The evidence fails to show the existence of any contract because

- (a) there was not, at any time, an offer and acceptance with respect to all given terms and hence no meeting of the minds with regard to material terms of the alleged contract.

- (b) the alleged contract was subject to approval by appellee of a sample submitted by appellant of the merchandise involved—and this sample was not approved by appellee.

- (c) Trade custom and usage were relied upon to supply an important and material part of the alleged contract and the evidence discloses that appellee did not rely upon such trade custom and

usage but demanded it be made a part of the written contract—which was not done. Also appellant was not aware of such trade custom and usage.

(d) A contract was to be created only by a formal contract of appellant, to be executed by both appellee and appellant and that appellee refused to execute the same when it was presented for execution.

(e) There was no unequivocal acceptance by appellee of any offer made by appellant.

2. The evidence shows that Prince, Keeler & Co. Inc. who issued the “Bought—or—Sold Note” relied upon as the contract in this case, was a food broker only, and did not possess the relationship of agent for appellant in any manner sufficient to enable them to bind appellant to this alleged contract, or any contract required by the Statute of Frauds to be in writing.

We will state the facts relevant to the foregoing questions.

III.

THE FACTS.

In July, 1955, Sidney Sternau, representing appellant, in company with a Mr. Astrack of Prince, Keeler & Co. Inc., food brokers of New York City, called upon Mr. Kaplan of appellee firm. He showed Mr. Kaplan a small sample of apricot kernels and

endeavored to interest him in purchasing 75 tons of these kernels. (R. 150; R. 303, 4.) Mr. Kaplan was interested. Also, it was disclosed that appellant firm and its representative were new in the field of dealing in apricot kernels. (R. 304; R. 200, 2.) This fact was known to appellee.

On July 25, 1955, Prince, Keeler & Co. Inc. wrote appellant stating that Mr. Kaplan was interested in the kernels but would want 200 pounds of the kernels for a sample testing. (P. Ex. 1, R. 75.)

On August 22, 1955, appellant wrote Prince, Keeler & Co. Inc. that they hoped to be able to ship the 200 pound sample that week and asked to be advised of opening prices on this product "as it is a new item for us . . ." (P. Ex. 2, R. 78-80.)

On August 31, 1955, Prince, Keeler & Co. Inc. wired appellant that the price of kernels was 17 cents per pound, that appellee would buy at that price subject to approval of two bags (200 pounds) of sample. (P. Ex. 5, R. 84-5.) On the same date appellant wired Prince, Keeler & Co. Inc. that the kernels (200 pound sample) had been shipped but that the price was 18 cents per pound. (P. Ex. 6, R. 86.)

On September 1, 1955, Prince, Keeler & Co. Inc. wrote appellant that Mr. Kaplan "felt that, due to the fact you fellows were new in the business he should get a slightly lower price than the current market" but that he would buy the kernels at 17½ cents per pound. (P. Ex. 7, R. 88.) Concerning other details of the negotiations Prince, Keeler & Co. Inc.

stated: "Now then, since we are both new in this deal . . ." and then enclosed the "Bought—or—Sold Note" relied upon by appellee herein as the written contract between the parties. (P. Ex. 8, R. 89.)

In connection with this evidence Mr. Kaplan testified he knew appellant prepared their own contracts to be signed by purchasers of commodities from appellant (R. 207, D. Ex. B, C) confirming orders for the purchase of commodities.

Mr. Kaplan further testified as follows:

"Q. What next occurred in this transaction after you advised Prince-Keeler and Company of your approval of the sample?

A. Well, normally—and this had been the case in 1955 with many transactions I had with Prince, Keeler—normally a week or two or even longer goes by between the time we make (34) some confirmation of a transaction and we get a formal contract for execution. This is in the height of the buying and selling season. I am very busy; the broker is very busy; so that a week or more or two weeks would go by between such a transaction and its formal confirmation." (R. 163, 4.)

Also, appellee never introduced any proof that Prince, Keeler & Co. Inc. were authorized, in writing, or any other manner, to bind appellant to any contract required by the Statute of Frauds to be in writing. Appellant, through the witness Sternau, offered to prove that appellant had never authorized Prince, Keeler & Co. Inc. to bind it to any contract. The trial Court refused to allow questions directed

to this end and rejected the offer of such proof. (R. 306, 7.)

Prince, Keeler & Co. Inc. recognized they could not bind appellant to a written contract. In a letter dated October 26, 1955, Prince, Keeler & Co. Inc. wrote appellant: "The buyer has our sales memo and no one knows better than I do when dealing with Sunset that 'every price is subject to confirmation from Modesto . . .'" (P. Ex. 16, R. 113.) Also, in the same letter, they wrote: ". . . but I think we have tried to cooperate with you all the way—right down to our contracts—we printed special contracts just for Sunset which eliminate the Arbitration Clause, etc."

Attention is respectfully directed to the alleged contract in this case (P. Ex. 8, R. 89) which is not even the sales memo that Prince, Keeler & Co. Inc. refer to in their letter of October 26, 1955, as being the sales memo or "contract" they use in transacting business with appellant since the present alleged contract does contain an Arbitration Clause.

The alleged contract in this case, issued by Prince, Keeler & Co. Inc. was received by appellant. (P. Ex. 8, R. 89.) Appellant then prepared its written contract, dated September 6, 1955, and forwarded to Prince, Keeler & Co. Inc. for execution by appellee. (P. Ex. 9; D. Ex. A.) (R. 90; 307.) This was the procedure followed upon receipt of the sales memo (P. Ex. 8) by appellant. This was likewise the procedure followed by appellant in two other business transactions with appellee. (R. 207, 210; D. Ex. B, C.)

On September 8, 1955, Prince, Keeler & Co. Inc. wrote to appellant, acknowledged receipt by appellee of the 200 pound sample and *that Mr. Kaplan was satisfied with the sample except "the broken kernels far exceeded the normal tolerance."* They then state:

"We advised him that we were mailing your formal contract No. 2023 received today—however, during the discussion he advised that he had overlooked the following standard clause:

'Merchandise Not to Exceed 5% by Weight of Broken Kernels', and requested that we add this on our contracts and return yours for the same addition. He advised that all his regular suppliers, i.e. Calpak, Rosenberg, insert this clause which is a recognized condition of sale for this particular item. It was not brought up before, because he assumed it would be included as a matter of course, in your contract.

We are, therefore, returning your contract No. 2023 as enclosure and will appreciate your authorizing the addition of the above clause in compliance with the buyer's request. Awaiting your further advice in this matter." (P. Ex. 10; R. 94-97; 305, 6, 7, 8.)

This letter discloses the following facts:

(a) That appellee rejected the formal contract that appellant intended to be executed by both parties, to confirm the sale.

(b) That appellee made a counter offer to appellant involving a new and major term or condition upon which the sale was to be made and never accepted by appellant. (R. 308, 310; P. Ex. 11.)

(c) That appellee was unwilling to rely upon the trade custom or usage it pleaded as being a part of the contract, but insisted that such custom and usage be specifically written into the contract of appellant (P. Ex. 9; D. Ex. A), viz: "that regular apricot kernels delivered not to exceed five percent by weight of broken kernels."

(d) That Prince, Keeler & Co. Inc. admitted its inability to bind appellant when they stated: "We . . . will appreciate your authorizing the addition of the above clause in compliance with the buyer's request." This language can only have been directed: (1) to the sales memo, the alleged written contract, in this case, and (2) the formal contract of appellant, which they returned, for its inclusion therein.

A condition of the sale being negotiated between the parties in this case was that it was subject to the approval by appellee of a sample to be submitted to it by appellant. (P. Ex. 8, the contract relied upon, P. Ex. 5; D. Ex. A.)

This sample was never approved by appellee. (P. Ex. 10, R. 94, 96; P. Ex. 11, R. 98.) Nor was it waived by appellee by any writing modifying the alleged contract. Appellant, however, informed Prince, Keeler & Co. Inc., the broker, that it could not meet the requirements of the objection to the sample. (P. Ex. 11, R. 98, R. 308, 311, 313.) This was by letter dated September 21, 1955.

On or about September 22, 1955, Mr. Kaplan, representing appellee, came to San Francisco. The reason

for this trip was that there had been a fire at a plant operated by Sewall, Brown & Co., in Los Gatos, that had destroyed a great amount of apricot kernels that appellee had bought or ordered from that firm. (R. 164.) While in San Francisco Mr. Kaplan was advised by telephone by Prince, Keeler & Co. Inc. of the appellant's letter of September 21st, stating it could not comply with the requirement of the appellee that the apricot kernels "not exceed 5% by weight of broken kernels." (R. 165, 168.) There were several telephone talks between Mr. Kaplan, representing appellee and Mr. Sternau, representing appellant. Mr. Kaplan testified that Mr. Sternau told him that because of the fire at the Sewall, Brown & Co. plant he was having difficulty in cracking the apricot kernels to be delivered to appellee. (R. 170.) He also testified he had a second telephone talk with Mr. Sternau and advised him that California Packing Corporation would crack these kernels and that Sternau told him he appreciated such help and that he (Kaplan) would get delivery of these kernels. (R. 173.) Sternau, however, testified he did not expect Sewall, Brown & Co. to crack these kernels. (R. 97.) He testified Continental Nut Company had cracked the sample 200 pounds sent to appellee. (R. 93, 320.) He further testified that he did not have any independent recollection of his telephone talks with Mr. Kaplan while the matter was in San Francisco during the period September 21 to 24, 1955. (R. 310, 311.)

Mr. Sternau testified that his firm tried to get delivery of apricot kernels from their supplier, a man

named Bonzi, after September 21, 1955, but were turned down finally on November 16, 1955. (R. 324, 327.) Appellee was notified on November 16, 1955, that appellant would not be able to help them get delivery from Bonzi of the kernels they desired. (R. 332.)

Mr. Sternau further testified that at no time did appellee waive the requirement that any apricot kernels to be sold to appellee by his firm should not "exceed 5% by weight of broken kernels." (R. 129.)

Following the letter of September 21, 1955, there was correspondence between the parties.

On October 12, 1955, appellant wrote Prince, Keeler & Co. Inc., partially in response to a letter of theirs of September 28th. (P. Ex. 12, 13; R. 105, 107.) In this letter appellant, in rejecting an offer for another product as being too low, comments that appellee is in the same class; that appellee, in getting "Cal Pack" (California Packing Corporation) to shell the apricot kernels, were only doing themselves a favor because they bought them at a low price and wanted delivery.

On October 31, 1955, Mr. Sternau wrote Prince, Keeler & Co. Inc. again. (P. Ex. 17; R. 113.) This was in reply to a letter from Prince, Keeler & Co. Inc. of October 26, 1955. (P. Ex. 16; R. 113.) In this letter Mr. Sternau sets forth his efforts to get his supplier, Bonzi, to deliver the apricot kernels. He also stated appellant acted in good faith, the buyer bought in good faith and that Prince, Keeler & Co. Inc. sold in good faith.

It is on the basis of these last two letters that appellee rests its case that appellant ratified a previously existing contract.

However, in this same letter, Mr. Sternau calls attention to the fact that he cannot accept any sales memo containing an Arbitration Clause. Yet the alleged contract in this case contains such a clause.

Furthermore, Prince, Keeler & Co. Inc. in its letter to appellant of October 26, 1955, confirmed that they had printed what they termed "special contracts just for Sunset which eliminate the Arbitration Clause, etc."

Appellant offered to introduce two of these "special contracts" prepared by Prince, Keeler & Co. Inc. for use in sales involving appellant with appellee to show the difference in the terminology of those sale memos with the one involved herein. (P. Ex. 8.) The Court below, on objection, refused to admit them in evidence. Thereupon, appellant made an offer of proof, likewise rejected. (R. 291, 294.)

On November 4, 1955, appellant wrote Prince, Keeler & Co. Inc. again. (P. Ex. 24; R. 123, 4.) Again reference is made to a sale of the kernels, the effort of appellant to obtain the kernels from the supplier and to the fact that "our sample was not satisfactory to the buyer." Again, appellant indicates, that because of the fire at Sewall, Brown & Co., he is willing to try and obtain kernels for appellee but that the condition of the sample still exists and cannot be met, to-wit, that compliance cannot be made under the "5% clause."

Appellee asserts the custom and usage of the trade dealing in "regular apricot kernels" to attach an unwritten custom to a contract in writing, namely, that kernels delivered "shall not exceed 5% by weight of broken kernels". Appellee pleads such custom as attaching to the alleged written contract herein. Yet the record is clear that it did not rely upon such custom in the instant case. Moreover, one of their own witnesses, Mr. Engell, an officer of California Packing Corporation, testified that it was customary for such condition, not *to attach* to a contract, but to be written into the contract itself:

"Mr. O'Connor. Q. Mr. Engell, was the clause put in these particular contracts with American Almond at their request?

A. It is a common procedure and a customary practice to put the clause in because it is not printed in the contract.

Q. It is common procedure and customary practice to put that clause in a contract?

A. It is accepted by the industry in all dealings that we make.

Q. And it is the customary practice to put it into the written contract; is that correct? The reporter has to hear your answer.

A. Yes.

Mr. O'Connor. Thank you.

Further Redirect Examination

Mr. Eisner. Q. Mr. Engell, it is customary with California Packing Corporation. Do you know whether or not it is customary with other producers and sellers of apricot kernels, such as Rosenberg Brothers & Company, such as Sewall, Brown & Company, to expressly include such a tolerance clause, or to let it be implied?

Mr. O'Connor. Just a moment, if the Court please. That is asking the witness to qualify himself as having knowledge of a particular trade practice of other companies and he has not been qualified as having such knowledge.

The Court. If he knows, he may answer.

A. I know that other companies do use that clause.

Mr. Eisner. Q. Do they include it or do they not include it—I mean expressly?

A. I would say they include it.

Mr. O'Connor. I will withdraw the objection, your Honor.

Mr. Eisner. Q. Are you personally familiar with whether or not Rosenberg Brothers & Company expressly include the clause?

Mr. O'Connor. Just a minute.

A. That I couldn't answer correctly, other than what knowledge I have gained through association with the sales department to the effect that other companies use the five percent broken clause.

Mr. Eisner. That is all." (R. 251, 2, 3.)

IV.

SPECIFICATION OF ERRORS.

Appellant contends that the trial Court erred in

1. Finding, as it did in Finding No. 3, that a contract was created between the parties, and in finding that appellant and appellee agreed to the terms of such contract as set out in that Finding, and erred in making all later findings based upon the existence of such a contract.

2. Finding, as it did in Finding No. 4, that Prince, Keeler & Co. Inc. acting as broker and agent of appellant and appellee, issued and signed a written memorandum of said sale, which memorandum fully set forth the terms of said sale.

3. Finding, as it did in Finding No. 5, that a sample, submitted by appellant to appellee, was approved by appellee.

4. Finding, as it did in Finding No. 6, that appellant confirmed and ratified said contract of sale and in writing ratified the act and authority of Prince, Keeler & Co. Inc. in executing the memorandum of sale on its behalf.

5. Finding, as it did in Finding No. 7, that a trade custom existed with respect to regular apricot kernels that in any delivery of which the broken kernels shall not exceed 5% by weight and that said trade custom was a part of the contract of sale by appellant to appellee.

6. Finding, as it did in Finding No. 8, that it was not intended by the parties (to this action) that the existence of a contract should be dependent on the execution of a formal contract and that the broker's memorandum constituted the contract of the parties.

7. Finding, as it did in Finding No. 9, that appellant promised it would make delivery under the memorandum of sale issued by Prince, Keeler & Co. Inc. and that appellee relied upon such promises to its detriment; that appellant by its conduct is estopped

to rely upon the Statute of Frauds or to deny the existence of the memorandum as a contract.

8. Finding, as it did, in Findings Nos. 10, 11 and 12.

V.

ARGUMENT.

A. NO CONTRACT WAS CREATED BETWEEN THE PARTIES.

1. Preliminary statement.

On the question of whether a contract was created, there is little conflict in the evidence. Most of the evidence is in writing but there is some oral evidence by testimony of witnesses and a lack of evidence in one particular that involves the application of the defense of the Statute of Frauds.

It has been and now is the contention of appellant that as a matter of law no contract was created between the parties. There were negotiations between the parties, but these negotiations never culminated in an agreement or meeting of the minds on the terms and conditions sought to be imposed in an agreement by each of the parties.

It is the further contention of appellant that the contract between the parties was to be created only by the formal contract of appellant, executed by both parties, which contract was tendered by appellant to appellee and rejected by appellee.

We will show:

(a) That there was not an offer and acceptance with respect to all given terms and hence

no meeting of the minds with regard to material terms of the alleged contract.

(b) That the parties intended and understood that any agreement which might be made between them would be made by a formal contract of appellant executed by both parties, which was not done.

(c) Trade custom and usage were relied upon by appellee to supply an important and material part of the alleged contract and the evidence discloses that appellee did not rely upon such trade custom and usage and appellant was not bound thereby by such trade custom and usage because he was unaware of the same and this fact was known to appellee.

(d) That the parties to the alleged contract, required by the Statute of Frauds to be in writing, did not, themselves, execute said alleged contract and the alleged agent did not, in fact, have the authority or relationship with appellant sufficient to enable said agent to bind appellant to the alleged contract.

(e) That there was no mutuality of remedy between the parties to the alleged contract.

2. There was not an offer and acceptance with respect to all given terms and hence no meeting of the minds with regard to material terms of the alleged contract.

Appellee contends and the trial Court found that the contract in this case was the "Bought—Sold Note" dated September 1, 1955.

Appellant contends that such "note" was not a contract.

The evidence in this case is conclusive that the parties did not regard such "note" as a contract at the time Prince, Keeler & Co. Inc., the food broker of New York, forwarded a copy to each of them.

Appellee instructed Prince, Keeler & Co. Inc. that it insert in such "note" the clause "merchandise not to exceed 5% by weight of broken kernels." (P. Ex. 10.) This was never done, nor was it ever waived by appellee.

Appellant on receipt of such "note", forwarded to Prince, Keeler & Co. Inc., its formal contract to be signed by appellee. Tender of this contract of appellant was made by Prince, Keeler & Co. Inc. to appellee who refused to sign the same until that contract was amended to include the "5% clause" in said contract. (P. Ex. 9, 10.)

In short, appellant wanted its own contract, with its conditions, to be executed by appellee in order to confirm and complete the proposed sale. This was never done.

Thus, on the one hand we have an offer by appellant to sell the 75 tons of apricot kernels reduced to a formal contract of its own, tendered to appellee and rejected by appellee. Even more important, the evidence shows that appellee demanded that the "note" which it relies upon as the contract in this case, be modified to include the clause "merchandise not to exceed 5% by weight of broken kernels" and that Prince, Keeler & Co. Inc. wrote to appellant asking

appellant to authorize them to include that clause in the "note". (P. Ex. 10.)

In the case of *Hunkins etc. Willis & Co. v. L. A. County*, 155 Cal. 41 (99 Pac. 369) the Court details the test of determining whether there is a contract binding between and upon each of the parties sought to be charged.

"To constitute a binding contract of sale made in the form of letters and telegrams which passed between the prospective seller and purchaser, there must be a proposal squarely assented to. If the acceptance be not unqualified or go not to the actual thing proposed, then there is no binding contract. A proposal to accept, or an acceptance based upon terms varying from those offered, is a rejection of the offer."

It was held, from the letters and telegrams which passed between the parties, that they did not constitute a proposal squarely assented to.

The Court quoted with approval from *Four Oil Co. v. United Oil Producers*, 145 Cal. 624, 79 Pac. 366, Henshaw, J.:

"The rules for determining whether or not a proposal and acceptance constitute a binding contract are well settled, and by this Court have been expressed in the foregoing language: 'To constitute a binding contract made in this form (letter) there must be a proposal squarely assented to. If the acceptance be not unqualified, or go not to the thing proposed, then there is no binding contract. (1 Wharton on Contracts, sec. 4.) A proposal to accept, or an acceptance based upon terms varying from those offered, is a rejection

of the offer. (National Bank v. Hall, 101 U.S. 43, 51.) An offer imposes no obligation unless it is accepted upon the terms upon which it is made. (Tilley v. County of Cook, 103 U.S. 161.) An acceptance must be absolute and unqualified. A qualified acceptance is a new proposal.' (Civ. Code 1585.) Wristen v. Bowler, 82 Cal. 84, 82 Pac. 1136.)"

It is the contention of appellant in the instant case that appellee by its rejection of the contract of appellant (P. Ex. 9) and its demand that there be inserted therein the "5% clause", rejected the offer of appellant.

As authority for this proposition of law we cite the case of *Ajax Holding Co. v. Heinsberger*, 62 Cal. App. (2d) 665 (149 Pac. (2d) 189, par. 1, page 669:

"To be effective an acceptance must be unequivocal and positive and must comply with the terms of the offer (90 Cal. App. 136, 265 Pac. 501.) It must be approved in the terms in which it is made. The addition of any condition or limitation is tantamount to a rejection of the original offer and the making of a counter-offer."

Par. 2:

"A counter-offer containing a condition different from that in the original offer is a new proposal and, if not accepted by the original offerer, amounts to nothing."

See also:

Lipschultz v. Gregory Elec. Co., 116 Cal. App. (2d) Supp. 915, 253 Pac. (2d) 537 (1953):

Par. 3, page 919:

“ ‘A proposal to accept or acceptance upon terms varying from those offered is a rejection of the offer.’ (91 Cal. App. 442, 27 Pac. 744.) ”

Par. 4:

“ . . . the parties must have consented to the same subject matter in the same sense, and the burden is upon the plaintiff to show that a contract, definite and certain in its terms, was entered into by the parties as a condition of obtaining any relief.” (Facts: verbal agreement to buy certain type transformer—delivery of another type and refusal to accept by buyer—judgment for defendant buyer.)

See also:

Robbins v. Pacific Eastern Corp., 8 Cal. (2d) 241, (65 Pac. 242) at page 276, par. 13:

“It is elementary that an acceptance is required to be identical with the offer and must be unconditional and not add any new terms thereto. If the terms of the offer are changed or added to by the acceptance, there is no meeting of the minds and no contract.”

While we have repeatedly referred to the absence of agreement upon the “5% clause” demanded by appellee, appellant also wanted, as part of the completed contract, the conditions contained in its contract (P. Ex. 9) which were intended by appellant to be a material part of the contract between the parties. The evidence discloses, as previously referred to in the Statement of Facts, that on a prior occasion

and during the very time negotiations in the instant case were going on, that appellant sold to appellee other types of merchandise and the agreement between the parties *was evidenced by appellant's formal contract executed by both parties.*

The case of *Store Properties Inc. v. Neal*, 72 Cal. App. (2d) 112 (164 Pac. (2d) 38), stated, par. 1(a), p. 17:

“To be finally settled an agreement must comprise all material, terms and conditions which the parties intend to introduce. In their absence there is no completed contract.”

(b) That the parties intended and understood that any agreement which might be made between them would be made by a formal contract of appellant executed by both parties, which was not done.

Appellee contends that the evidence in this case, without contradiction, proves that the parties intended to enter into a formal contract, reduced to writing, containing mutually beneficial terms and conditions and that this was never done.

In short, both parties contemplated and understood that the negotiations between them through Prince, Keeler & Co. Inc., as a broker, were to be reduced to a writing to be signed by each of them.

3. The parties intended and understood that any agreement which might be made between them would be made by a formal contract of appellant executed by both parties, which was not done.

It is the contention of appellant that neither of the parties to this action intended or understood that

the "note" was to be the contract and contain all of the terms of the agreement between the parties.

Proof of this fact is the action of the appellant, which upon receipt of the "note" or sales memorandum from Prince, Keeler & Co. Inc., immediately prepared its own contract and forwarded the same to Prince, Keeler & Co. Inc. for signature by appellee. (P. Ex. 9.)

Also, and more important, is the testimony of Mr. Kaplan for the appellee, in which he stated that he was aware of the fact that appellant prepared its own contract to be signed by appellee for commodities from appellant, had previously done so himself, and his testimony previously referred to in the statement of facts herein that "normally a week or two or even longer goes by between the time we make some confirmation of a transaction and we get a formal contract for execution." (R. 163-4, 207.) Also, Mr. Sternau, for appellant, testified that upon the receipt of said "note" his firm mailed its formal contract to Prince, Keeler & Co. Inc for signature of appellee. (R. 306.)

Clearly, until this formal contract was signed by both parties, neither of the parties intended or understood that the "note" constituted a contract between them.

The leading case and authority on this proposition of law is that of *Spinney v. Downing*, 108 Cal. 666 (41 Pac. 797) where the Court held that when it is part of the understanding between the parties to a contract that the terms of the contract are to be

reduced to writing, and signed by both parties, the assent to its terms must be evidenced by the signatures of both parties or it does not become a binding obligation upon either, especially where the proposed contract contains reciprocal stipulations and covenants upon the part of each party as a consideration for the acts of the other.

The Court further held, page 669:

“Notwithstanding the instrument declared upon was fully executed upon the part of the defendant, the contract was still incomplete and neither party bound thereby.”

In this case one of the parties had signed the contract and the other, although not signing, had proceeded to act upon the contract. The party signing the contract attempted to raise an estoppel against the party not signing it on the basis of performance by him. The Court rejected this claim of estoppel, stating, page 670:

“Furthermore, estoppels must be mutual, and it is obvious under the rule laid down that Downing could not have been held bound under the proposed contract which Spinney had failed to sign, but could have repudiated it at any time.”

In the instant case it is the contention of appellant that appellee could not at any time and could not now be bound by the so-called “note” contract plus the trade custom of “5%” which they allege became part of the note since they had demanded this 5% clause be inserted in the written contract of appellant and

had refused to sign the contract of appellant without that clause being written into it.

The case of *Dexter v. Ankiewicz*, 26 Cal. App. (2d) 326 (79 Pac. (2d) 400), reaffirms the doctrine of the *Spinney* case under circumstances very similar to those of the instant case where correspondence is relied upon to cure the defect where a contract was to be reduced to writing and executed by all parties, but was not done, page 333:

“This question must be answered in the negative. Where the parties understand that before a contractual relationship shall exist the terms of their contract are to be reduced to writing and signed by them, a binding or completed contract does not arise until a writing evidencing the terms of their agreement has been executed by the respective parties. (*Mercantile Trust Co. v. Sunset etc. Co.*, 176 Cal. 461, 469 (168 Pac. 1037); *Spinney v. Downing*, 108 Cal. 666, 668 (41 Pac. 797).)”

In the case of *Autry v. Republic Productions, Inc.*, 30 Cal. (2d) 144 (180 Pac. (2d) 888) at page 151, the Court stated:

“There is no dispute that neither law nor equity provides a remedy for breach of an agreement to agree in the future. Such a contract cannot be made the basis of a cause of action. *The Court may not imply what the parties will agree upon.*”

Under the doctrines enunciated in the above cases and by reason of the evidence and the record, which is uncontradicted, we believe it merely a matter of

law as to whether or not there was a contract in the instant case. We further believe that the law is quite clear in the cases cited supra, that where both parties to negotiations intend, understand and expect those negotiations to result in a formal contract to be signed by both parties that no contract exists until such time as that formal contract is signed.

Obviously, in the light of the evidence in this case we can only conclude that the "note", whatever its title, was merely a memorandum addressed to both parties by the broker and the sole function of this memorandum was to advise the parties of the terms of sale which should be incorporated in the formal contract that was to be thereafter executed by both parties. The latter step, not having taken place, we contend that there is no contract in existence upon which appellee could assert a claim against appellant.

Forgeron Inc. v. Hansen, 148 Cal. App. (2d) 352, 308 Pac. (2d) 406.

4. Trade custom and usage could not be relied upon to supply an important and material part of the alleged contract.

The trial Court found in accordance with the pleading of appellee that there was a trade custom and usage in connection with the interpretation of what was meant by "regular apricot kernels" in that delivery of said apricot kernels to a purchaser was governed by the trade custom that said delivery of kernels would "not exceed 5% by weight of apricot kernels." The Court held that in the case of the alleged contract, in the instant case the "note", that said trade custom attached to and became a part of

the contract. There is no conflict in the evidence which conclusively shows that the appellant in this case was new in the business of selling apricot kernels. Both parties and the broker have acknowledged that fact. (P. Ex. 7, 10.) That such custom attached to and became a part of contracts involving regular apricot kernels, in the trade, without being written into the contract, is denied by one of the witnesses of appellee in this action. Mr. Engel of California Packing Corporation, whose testimony appears in the Statement of Fact herein, clearly testified the trade custom was that this particular clause was written into and became a part of the written contract between seller and purchaser of regular apricot kernels.

Additionally, the question might be asked, did appellee, the proposed buyer herein, rely upon this trade custom as attaching to the alleged contract, the "note" in this case? The answer is no. (P. Ex. 10.) Mr. Kaplan, representing appellee demanded of the broker that not only should this clause be written into the "note" or sales memorandum, but that it also be written into the formal contract of appellant and he refused to sign that contract until it was written into said contract. Again, we have undisputed facts which resolve themselves into a question of law on interpretation.

In the case of *Robertson v. Dodson*, 54 Cal. App. (2d) 661 (129 Pac. (2d) 726), p. 664, the Court said:

"A person is not bound by a custom or usage unless he had actual knowledge thereof, or it is so general or well known in the community as to give rise to the presumption of such knowledge."

P. 665, par. 4:

“A custom or usage which is confined to a particular trade or business, is binding upon those not engaged in the calling only in case they have either express or implied knowledge of its existence.”

Par. 6:

“Custom and usage may be used as an instrument of interpretation, but may not be used to create a contract.”

Latta v. Da Rosa, 100 Cal. App. 606 (280 Pac. 711), to the same effect.

Security etc. Bank v. Southern etc. Bank, 74 Cal. App. 734 (241 Pac. 945):

P. 749, par. 13:

“A custom or usage which will enter into and affect the rights and liabilities of persons in their dealings with each other must be certain, uniform and either known to those sought to be charged thereby or so generally known or notorious that knowledge and adoption thereof must be presumed.”

In *Sharp v. Keating*, 13 Cal. App. (2d) 637 (57 Pac. (2d) 539), the Court said, page 640, par. 2:

“However, we think the law is that parties, as to a subject matter concerning which known usages prevail, by implication, incorporate them into their agreements, *if nothing is said to the contrary* (Court’s italics). Cited: 25 Cal. Jur. 420; 6 Cal. Jur. 315; *Robinson v. United States*, 13 Wall. (80 U.S.), 363 (20 L. Ed. 653).”

It is respectfully contended that appellee's rejection of appellant's contract without the alleged custom "5% clause" in which they demanded that it be written in that contract, constitutes "the something said to the contrary" referred to in the *Sharp* case, supra, so that the application of such "custom" to complete the "note" as a contract binding upon appellant is not available to appellee herein.

It would appear from the evidence that what appellee actually proved, is that the trade custom of those engaged in the business of selling apricot kernels is to incorporate a 5% clause into the signed instrument itself. This is far different than proving a trade custom that would attach an unwritten custom to a contract in writing. It should also be noted (P. Ex. 10) that Prince, Keeler & Co. Inc. quote Mr. Kaplan as stating the "5% clause was written into such contracts by all of his regular suppliers".

Finally, throughout the entire correspondence and throughout the entire testimony in this case, the evidence shows that appellant at all times maintained that he was unable to comply with this "5% clause". If it is conceded that the existence of the "note" as a contract in the instant case is dependent upon the attachment to it of this trade custom, and we see no alternative to his proposition, then under the state of the evidence appellant respectfully maintains that said trade custom did not attach to said "note" and become a part of it and that hence said "note" fails as a contract between these parties.

5. The parties to the alleged contract, required by the statute of frauds to be in writing, did not execute it and the alleged agents of appellant, the food broker, did not have the authority and relationship of agent with appellant sufficient to bind it to the alleged contract.

The alleged contract, the "note", was not signed by either party.

Section 2309, California Civil Code, provides that where a contract is required by law to be in writing, the authorization (to an agent) must be in writing.

Sections 1724 of the Civil Code and 1973 (a) of the Code of Civil Procedure specifically require a contract of the kind involved herein to be in writing, signed by the party to be charged or his agent in his behalf.

Appellant, in his answer, pleaded these statutes as a bar to recovery by appellee in the instant case.

The problem of a binding contract herein can be resolved by the answer to this question:

Did Prince, Keeler & Co. Inc., the food broker involved herein, who issued the "note", found to be a contract by the trial Court, have authority to bind appellant?

The answer must be no.

Prince, Keeler & Co. Inc. recognized that they had no such authority.

1. The "note" itself, in bold type states:
"Subject to confirmation of Seller."

2. In their letter, dated September 8, 1955, returning the written contract of appellant, they ask for

authorization of appellant to insert the "5% clause" into the contract. There is no proof they ever received such authority. (P. Ex. 10.)

3. In their letter of October 26, 1955 (P. Ex. 16) they reaffirm their inability to bind appellant. In this letter they admit every price is subject to confirmation from Modesto (where appellant is engaged in business). Further, they state they had prepared special contracts for appellant eliminating the Arbitration Clause, etc. This could only mean they recognized they could not bind appellant in any manner and particularly by the form and content of the "note" they used in this case which does include the Arbitration Clause and other conditions.

4. Mr. Sternau testified his firm had never authorized Prince, Keeler & Co. Inc. in writing, to bind it to any contract. Objection was made that this called for the conclusion of the witness and was sustained. We feel the trial Court was in error in sustaining such objection. It being a matter of law it is now urged that this Court has the authority to reverse such ruling and allow the answer to stand. If it does so, the record is complete that Prince, Keeler & Co. Inc. was not an agent of appellant with proper authority to bind it to the alleged contract in the instant case. (R. 306, 7.) An offer of proof was thereupon made to the same effect and likewise rejected. This ruling, likewise, we claim as error.

5. Mr. Kaplan, of appellee firm, himself admitted that in other deals with appellant the particular type of "note" used herein (P. Ex. 8) was not used. (R.

205.) Also, in evidence, are two contracts entered into, through Prince, Keeler & Co. Inc. as broker, and in both instances appellant's contract was used. (D. Ex. B, C, R. 207, 8.)

6. The burden of proving the authority of Prince, Keeler & Co. Inc. to bind appellant to the alleged contract in this action was upon appellee, as plaintiff below. Yet appellee did not produce a single iota of evidence to meet this burden. Nor is there any evidence to support such authority in this record.

Can it be claimed here that appellant ratified the act of Prince, Keeler & Co. Inc. in issuing the "note", found to be the contract in this case?

Based upon Section 2310, Civil Code, the answer must be in the negative. That Section reads as follows:

"Ratification; manner. Ratification of Agent's Act. A ratification can be made only in the manner that would have been necessary to confer an original authority for the act ratified, or where an oral authorization would suffice, by accepting or retaining the benefit of the act, with notice thereof."

Admittedly, appellant neither accepted any benefit of any act of Prince, Keeler & Co. Inc., since there was none, nor retained any benefit, since none was received.

The entire evidence in this case discloses that Prince, Keeler & Co. Inc. did not, at any time, profess to be an agent of appellant with authority to bind it

to a contract. Verification for this is found in their letters. (P. Ex. 10, 16, 27.)

Hence, at the very time they issued the "note" sought to be claimed as a contract, Prince, Keeler & Co. Inc. knew and appellee knew, they were merely acting as a broker, a middleman, forwarding the terms of purchase to appellant for approval.

"In the law of agency, ratification is the subsequent adoption and affirmance by one person of an act which another without previous authority has assumed to do as his agent."

2 *Cal. Jur.* (2d) 731.

"The doctrine of ratification proceeds upon the theory that there was no previous authority and that the relation of principal and agent did not in fact exist with respect to the act in controversy."

2 *Cal. Jur.* (2d) 740.

"Furthermore, the prevailing view is that there can be no ratification if the person who performed the unauthorized act did not at the time profess to be an agent."

2 *Cal. Jur.* (2d) 741.

In *Anderson v. Fay Improvement Co.*, 134 Cal. App. (2d) 738 (286 Pac. (2d) 513), the Court, speaking of ratification, states, after citing the above quotations:

"But since ratification contemplates an act by one person in behalf of another, there must exist at the time the unauthorized act was done a relationship, either actual or assumed, of principal

and agent, between the person alleged to have ratified and the person by whom the unauthorized act was done.”

Royal v. Roberts, 110 Cal. App. (2d) 814 (243 Pac. 879) to the same effect.

A broker has been defined in this State to be:

“A middleman, whose business is to bring seller and buyer together.”

Ryan v. Walker, 35 Cal. App. 116 (169 Pac. 417).

“Except to the extent that he acts as agent for either party, a broker, strictly speaking, is a mere middleman or negotiator to bring the parties together to form their own contract.

Except to the extent that a broker may be employed to act as the agent of one of the parties, as explained *infra*, section 14, he is, strictly speaking, a middleman or intermediate negotiator between the parties; and his duty is merely to bring the principals together to negotiate with each other for the purpose of making a contract, or to find and produce a purchaser or seller able, ready, and willing to accept his client’s terms, or to effect a transaction with his client upon any terms satisfactory to both; or, if so authorized, to make the contract for them . . .”

12 *C.J.S.* page 10, section 6.

By virtue of the facts referred to and the law cited herein appellant respectfully contends that Prince, Keeler & Co. Inc. did not have, or profess to have, at the date it issued the “note” authority as an agent to bind appellant thereto.

But this "note" is the contract relied upon by appellee.

No evidence of ratification of authority is in this record.

It must follow, therefore, that said "note" could not and did not constitute a contract between the parties.

6. There is no mutuality of remedy between the parties to the alleged contract.

Appellant respectfully calls attention to the fact that the record in this action reveals that not only was he unable to meet the condition of the "5% clause" insisted upon by the appellee, but that this evidence was uncontradicted and the condition never waived by appellee.

Yet, he has been held responsible in damages to appellee. If the trial Court is correct then appellant should likewise have had available to him a similar right to hold appellee in damages for non-performance. Aside from the question of proper execution of the alleged contract by appellee, would not this same appellee have had and presently does have a complete defense based upon the unsatisfactory sample and the inability of appellant to deliver kernels that would conform to the "5% clause" condition insisted upon by appellee—and never waived. We think the result of such action by appellant against appellee would obviously result in favor of appellee in such reversed position. Yet, if this be true, there was a lack of mutuality of obligation between the

parties to this alleged contract. If this be true then it constitutes a fatal defect in the "note" as a contract—and it must fall.

12 *Cal. Jur.* (2d) 317, Sec. 114;

Sloan v. Stearns, 137 Cal. App. (2d) 289, 290
Pac. (2d) 382.

VI.

CONCLUSION.

Appellant respectfully submits that upon any and each of the grounds herein discussed, the judgment of the trial Court should be reversed with directions that judgment be entered in favor of appellant and against appellee.

Dated, San Francisco, California,
March 18, 1958.

Respectfully submitted,
RAYMOND J. O'CONNOR,
Attorney for Appellant.

No. 15,690

United States Court of Appeals
For the Ninth Circuit

SUNSET-STERNAU FOOD Co., a corporation,	}	<i>Appellant,</i>
vs.		
AMERICAN ALMOND PRODUCTS Co., INC., a corporation,	}	<i>Appellee.</i>

BRIEF OF APPELLEE.

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FILED

APR 30 1958

PAUL P. O'BRIEN, CLERK

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No. 15,690

United States Court of Appeals For the Ninth Circuit

SUNSET-STERNAU FOOD Co.,
a corporation,

Appellant,

vs.

AMERICAN ALMOND PRODUCTS Co., INC.,
a corporation,

Appellee.

BRIEF OF APPELLEE.

STATEMENT OF THE CASE.

The action is for breach of contract to deliver regular apricot kernels. The default in delivery and the damages suffered are not in controversy. The existence of the contract is the only issue presented by this appeal.

The trial Court has specifically found against appellant upon every point raised. Appellant contends that the evidence is insufficient as a matter of law to support certain of the findings. It is unnecessary to refer to the presumptions in favor of the findings or their conclusiveness on appeal if supported by substantial evidence.

CONTENTIONS OF APPELLANT.

The contentions of appellant are set forth on pages 3 and 4 of the opening brief. They are stated as follows:

“1. The evidence fails to show the existence of any contract because

(a) there was not, at any time, an offer and acceptance with respect to all given terms and hence no meeting of the minds with regard to material terms of the alleged contract.

(b) the alleged contract was subject to approval by appellee of a sample submitted by appellant of the merchandise involved—and this sample was not approved by appellee.

(c) Trade custom and usage were relied upon to supply an important and material part of the alleged contract and the evidence discloses that appellee did not rely upon such trade custom and usage but demanded it be made a part of the written contract—which was not done. Also appellant was not aware of such trade custom and usage.

(d) A contract was to be created only by a formal contract of appellant, to be executed by both appellee and appellant and that appellee refused to execute the same when it was presented for execution.

(e) There was no unequivocal acceptance by appellee of any offer made by appellant.

2. The evidence shows that Prince, Keeler & Co. Inc. who issued the ‘Bought—or Sold Note’ relied upon as the contract in this case, was a food broker only, and did not possess the rela-

tionship of agent for appellant in any manner sufficient to enable them to bind appellant to this alleged contract, or any contract required by the Statute of Frauds to be in writing."

All of the foregoing contentions are in direct conflict with the following findings (Tr. pp. 39-42):

"3. That on or about the 1st day of September, 1955, defendant agreed to sell to plaintiff, and plaintiff agreed to purchase from defendant, approximately 75 tons of regular apricot kernels, 1955 crop, packed in 100 lb. net bags, Sunset brand, at $17\frac{1}{2}\text{¢}$ per pound, f.o.b. west coast dock, terms, less 2%—2 days' sight draft, shipment from California, half the quantity about October 31, 1955, balance about November 30, 1955. That said sale was made subject to approval by buyer of two bags of apricot kernels then enroute as samples.

4. That said purchase and sale was negotiated through Prince Keeler & Co. Inc. of New York, acting as broker. That on or about said first day of September, 1955, said Prince Keeler & Co. Inc. acting as broker and as agent of both seller and buyer, issued and signed a written memorandum of said sale, one signed copy of which, designated as 'bought note', was delivered to and received by plaintiff, and one signed copy of which designated as 'sold note', was delivered to and received by defendant. That said bought and sold notes fully set forth the terms of said sale. That said memorandum further sets forth that the sale is subject to confirmation of seller and approval of sample by buyer. That it further recites, "This memorandum shall be subordinate to a more for-

mal contract if and when such contract is executed; in the absence of such contract, this memorandum represents the contract of the parties."

5. That the two bag sample of apricot kernels was received by plaintiff from defendant on or about the 8th day of September, 1955. That on or about said 8th day of September, 1955, plaintiff examined and approved the said sample and notified Prince Keeler & Co. Inc. of said approval. That on the same day Prince Keeler & Co. Inc. by letter informed defendant that plaintiff had approved the sample.

6. That defendant confirmed said sale, and repeatedly, both orally and in writing, recognized and ratified the said contract of sale, and likewise in writing ratified the act and authority of Prince Keeler & Co. Inc. in executing the memorandum of sale on its behalf.

7. That there is and for many years prior to the commencement of this action has been, a general and well established trade custom and usage among those engaged in the California apricot kernel trade, that the term "regular apricot kernels" means, identifies and describes apricot kernels in any delivery of which the broken kernels shall not exceed 5% by weight. That according to trade practice, said tolerance of broken kernels is sometimes set forth in contracts of sale of regular apricot kernels and sometimes it is not set forth, but when not set forth it is implied. That the sample of apricot kernels submitted by defendant to plaintiff was a type sample representative of quality and had nothing to do with the quantity or percentage of broken kernels that would be present in any delivery under the con-

tract. That said trade custom and usage is a part of the contract of sale by defendant to plaintiff.

8. That it was not intended by the parties that the existence of a contract should be dependent on the execution of a formal contract; that no formal contract was ever executed and that the broker's memorandum constitutes the contract of the parties.

9. That from and after the first day of September, 1955, and until November 16, 1955, defendant, both orally and in writing, repeatedly promised and assured plaintiff that it would make delivery under said contract. That from the first day of September, 1955, until the 16th day of November, 1955, the market price of regular apricot kernels, 1955 crop, f.o.b. west coast dock, gradually rose from $17\frac{1}{2}\text{¢}$ per pound, and which was the market price on September 1, 1955, to 43¢ per pound which was the market price on November 16, 1955. That plaintiff relied upon the promises and assurance of defendant to its detriment. That defendant for the first time refused to make delivery on November 16, 1955, and at which time the market price had risen to 43¢ per pound, far in excess of that price at which plaintiff could and would have purchased said regular apricot kernels if not led to believe that defendant would perform the contract. That defendant is by its conduct estopped to rely upon the statute of frauds as defense in this case and estopped to deny the existence of the contract.

10. That from and after the first day of September, 1955 until the 16th day of November, 1955, the defendant repeatedly and consistently promised and assured plaintiff that it would de-

liver the 75 tons of regular apricot kernels and fulfill the terms of said contract. That on November 16, 1955, defendant for the first time refused to perform said contract and refused to make delivery of any of the regular apricot kernels called for by said contract. That at the time of said refusal the market price of regular apricot kernels, 1955 crop, f.o.b. west coast dock, was 43¢ per pound.”

**THE FINDINGS ARE SUPPORTED
BY THE EVIDENCE.**

Not only is there substantial evidence in the record to support the findings but any inconsistent finding would have been contrary to the weight of the evidence. We shall first review the evidence and then consider severally the contentions urged.

In reviewing the evidence, attention is particularly directed to the conduct of appellant following the issuance of the memorandum of sale by the broker. The repeated, definite and complete recognition of the existence of the contract refutes the contentions that there was not a meeting of minds; that there was not an approval of the sample; that a contract was dependent on the execution of a formal written agreement. There was ratification in writing that fully satisfies the requirements of the Statute of Frauds. There were repeated promises of performance relied upon by appellee, to its detriment, that would create an estoppel for appellant to rely upon the Statute of Frauds as a defense.

Prince, Keeler & Co. Inc. had acted as broker for appellant in the metropolitan New York area for a number of years (R. 72). In July, 1955, Sydney Sternau, President of appellant, went to New York and in company with a representative of Prince, Keeler & Co. Inc. called upon Mr. Kaplan, Secretary of appellee, in an endeavor to interest appellee in the purchase of 75 tons of regular apricot kernels (R. 73-74; 150-152). Apricot kernels are obtained from apricot pits which are first dried, then cracked and the shells separated from the nut meat or kernel. There are three types of apricot kernels—regular apricot kernels which are obtained from the pits of apricots that are dried; steamed apricot kernels which are obtained from apricots that are cooked for canning, pulp or juice, and the pits of which have been subjected to hot steam; and sulphured kernels which are obtained from apricots which have been sulphured and in which process both the fruit and pits have been exposed to sulphur (R. 145-149).

At the time Mr. Sternau called upon Mr. Kaplan opening prices had not been announced and Mr. Sternau assured Mr. Kaplan that the price asked would be competitive (R. 73, 80, Ex. 2, R. 79). At the time of this conversation, Mr. Sternau had with him a small sample of apricot kernels, which he showed to Mr. Kaplan. The sample was too small for Mr. Kaplan to judge of the quality, and he asked that he be supplied with a type sample of 200 lbs. so that he could make a test run in his plant. Appellee is in the business of processing the kernels and making them into a paste, which is sold to bakers and confectioners

and primarily used as a filler for making macaroon cookies (R. 146).

Following this conversation there was follow-up correspondence between the appellant and its broker in which appellant encouraged the broker to do all it could to negotiate the sale, and promised to forward the requested sample (Exs. 1-4, R. 75, 79, 82-84).

At the end of August, 1955, the broker wired appellant that opening prices for apricot kernels had been announced and that appellee had offered to pay 17¢ per pound (Ex. 5, R. 85). On the same day, August 31, 1955, appellant wired back that the price was 18¢ and also that the 200 pound sample had been shipped on that date (Ex. 6, R. 86). On September 1, 1955, a telephone conversation was held between William Berke of Prince, Keeler & Co., Inc. and Steve Tarrico, of appellant, in which a price of 17½¢ was authorized by appellant. This offer was communicated to appellee on the same day and accepted.

On the same date, September 1, 1955, Prince, Keeler & Co. issued its bought and sold notes or memoranda of sale covering the transaction and delivered a bought note to appellee and mailed a sold note to appellant. Exhibit 7 (R. 88), a letter from Prince, Keeler & Co. Inc. to appellant, confirms the telephone conversation with Steve Tarrico, the offer to appellee and its acceptance and encloses the sold note. With respect to this sold note, the letter states:

“With regard to shipping and packing—this is designated on *enclosed contract* which we believe will meet with your approval.

If there are any further questions on this—do not hesitate to contact us.

We certainly are glad to be able to *close this business* and thank you for your cooperation.”

The sold note mailed to appellant is Ex. 8 (R. 89) and the bought note is Ex. 13, (R. 107). Although one is designated as “sold note” and the other “bought note”, the two are identical. The notes recite that the sale is “subject to approval by buyer of two bags now enroute as samples to buyer”. It further recited “this memorandum shall be subordinate to a more formal contract if and when such contract is executed. In the absence of such contract this memo represents the contract of the parties”.

The 200 lb. sample was received by appellee. Appellee made a test run of the nut meat and found it to be of satisfactory quality. At the same time appellee noted that the sample contained in excess of 5% of broken kernels.

On the same day, September 8, 1955, in a telephone conversation, Mr. Kaplan told Mr. Sullivan of Prince, Keeler & Co. Inc. that the quality of the sample was satisfactory but observed that the percentage of broken kernels in the sample exceeded the tolerance permissible in a delivery of regular apricot kernels. In this same conversation Mr. Sullivan stated that he had received formal contracts from appellant. Mr. Kaplan told Mr. Sullivan that it was the custom of the trade that regular apricot kernels must not contain more than 5% by weight of broken kernels, that this

was sometimes expressed and sometimes implied, but always applicable. Mr. Kaplan stated that he would prefer that it be expressly stipulated in the formal contract as this was his first transaction with appellant (R. 159-160, 283-284, 298-300).

At this point a correction must be made in appellant's statement of facts. On page 18 of its opening brief appellant alleges that appellee demanded that the broker's note be modified to include the clause "Merchandise not to exceed 5% of broken kernels". This is a misstatement, as is clearly disclosed by the testimony. The request referred exclusively to the formal contract that had been forwarded by appellant to the broker (R. 160, 214-215). At page 214, the following question was asked by counsel for appellant on cross-examination of Mr. Kaplan and the following answer given:

"Q. So you did advise Prince-Keeler then to add that clause on to the so-called bought note of September 1st, did you not?

A. I did not."

On September 8, 1955, the broker wrote appellant advising of the approval of the sample by appellee and returned the formal contracts together with appellee's request that the tolerance clause be inserted. This letter is Exhibit 10. A copy of the formal contract which was returned with Exhibit 10 (R. 94) is Exhibit 9 (R. 90).

Appellant had received and retained the sold note without objection. It received the broker's letter of September 8 with the returned formal contracts with-

out protest or comment. It did not dispute that the 5% limitation of broken kernels was a recognized custom of the trade, as set forth in the broker's letter, and according to the testimony of Mr. Sternau, appellant simply retained all copies of the formal contract in its possession. It is also to be noted that appellant accepted the statement of the trade custom as set forth in the letter of September 8th without making any inquiry to ascertain or verify the accuracy of the recitals pertaining to the custom (R. 96, 316-318).

At this point it should also be mentioned that although appellant would have the court believe that appellant was ignorant of this trade custom because it was its first sale of apricot kernels, on cross-examination of Mr. Sternau it developed that appellant had for a period of ten years been engaged in the same business as that of appellee in making paste from apricot kernels and had made innumerable purchases of this commodity (R. 313-316).

Appellant made no reply whatsoever to Prince, Keeler & Co. Inc. after receipt of the letter of September 8, 1955, until September 21, 1955. At that time appellant wrote Exhibit 11 (R. 98) which reads as follows:

“Dear Bill:

We just had the packer in who was going to shell the apricot kernels and he advised me that he cannot guarantee 5% pieces, that they cannot be any better than the sample. He is having a very difficult time in shelling these and would like to *get out of this contract* this season. Please advise us if you are able to do it. It will be a

personal favor if it is possible to assist this man in setting up his plant the right way. Please advise me by Monday about this."

It is to be observed first that there is a tacit acceptance of the contents of the letter of September 8th. It is to be observed further, that there is a definite recognition of the existence of the contract, which necessarily would not exist if it depended upon the execution of a formal contract, if there had not been a ratification of the sale or if there had not been an approval of the sample.

On the taking of his deposition, Mr. Sternau was asked this question: "*This contract* that you refer to in this letter is the contract with the American Almond Products Co. for 75 tons of apricot kernels? A. Yes." (R. 99). Three days before this letter of September 21, 1955, was written, and in which appellant sought to get out of the contract, a fire had occurred at the plant of Sewell, Brown & Co. in which large quantities of apricot kernels had been destroyed and this was the reason appellant and Bonzi, with whom appellant was associated, wanted to get out of the contract. At this point we would respectfully direct attention to the cross-examination of Mr. Sternau with reference to the contents of this letter. It appears that the packer to whom he refers is Mr. Bonzi, whose business is that of gathering cannery refuse. The statement that this "packer" was having a difficult time in shelling these apricot kernels is deliberately false, as Bonzi had never shelled any kernels

and was not equipped to shell any kernels (R. 319-320).

Although Mr. Sternau testified that he did not know about the fire at the time that he wrote this letter, we respectfully call attention to his conflicting and evasive testimony on cross-examination (R. 321-322). It is perfectly obvious that if a fire of this magnitude occurred, Mr. Sternau would have been advised of it and Mr. Bonzi would have been advised of it.

The fire had occurred on Sunday, September 18, 1955 and Mr. Kaplan learned about it on Monday morning, the 19th of September (R. 164). Realizing its importance, Mr. Kaplan at once left New York for California and arrived at about September 21st (R. 165). After his arrival, Mr. Kaplan had a telephone message from Mr. Berke, of Prince, Keeler & Co. Inc. in which Mr. Berke read to Mr. Kaplan over the telephone Mr. Sternau's letter of September 21, 1955, Exhibit 11, (R. 167). At the request of Mr. Kaplan Mr. Berke mailed to appellee a copy of this letter (See Ex. 38, R. 168). After this telephone message from Mr. Berke Mr. Kaplan telephoned to Mr. Sternau. The substance of this telephone conversation appears at pages 170-171 of the transcript. The conversation is corroborated by George Wright (R. 141). Mr. Kaplan told Mr. Sternau that if it would be of assistance to him he could probably get the cracking done by California Packing Corporation or Rosenberg Bros., and Mr. Sternau stated that he would very much appreciate it if that was done. Mr. Kaplan thereupon got in touch with Mr. Carroll Glenney of the California

Packing Corporation and within an hour after the first telephone conversation with Mr. Sternau, telephoned to him again and advised him that he had obtained the cooperation of the California Packing Corporation to do the cracking at a toll and labor charge, and that Mr. Glenney had requested that Mr. Sternau contact the plant manager of California Packing Corporation, Mr. Engell, to finalize the charge and the date of cracking. Mr. Sternau told Mr. Kaplan that he was very appreciative of what he had done and assured him that appellee would get delivery of the kernels (R. 173). Mr. Kaplan reported to Prince, Keeler & Co. what had been done in this respect, and on September 28, 1955, Mr. Astrack, of Prince, Keeler & Co. wrote Mr. Sternau Exhibit 12 (R. 105), which sets forth and confirms in detail the arrangements that Mr. Kaplan had made on behalf of appellant with California Packing Corporation. We also call attention to the following language in Exhibit 12:

“It is understood, due to the fact that you have no shelling facilities for apricot kernels, that it has been arranged thru the kindness of Mr. Carroll Glenney of Cal. Pak. for Mr. Engell, Cal. Pak.’s plant manager, to shell the apricot kernels *which we sold American Almond for your account.*”

No reply was made by appellant until on October 12, 1955, Mr. Sternau wrote Exhibit 13 (R. 107) to Prince, Keeler & Co. Inc. in which he refers to the arrangement made with Cal. Pak.:

“The same thing goes for the American Almond Products. They are doing us no favor in getting

Cal. Pak. to shell the apricot kernels. They are doing themselves a favor because they *bought them* at a low price and they wanted delivery.”

Notwithstanding Exhibits 12 and 13, Mr. Sternau denied having any recollection of any telephone conversations with Mr. Kaplan and any arrangements made by Mr. Kaplan with California Packing Corporation (R. 103-107).

Under date of October 21, 1955, Prince, Keeler & Co. sent appellant the following telegram (Ex. 14, R. 108):

“American Almond insists on knowing when you are delivering apricot kernels per our order 9-12079 *which was confirmed by you.*”

Appellant made no reply to this telegram (R. 110). On October 25, 1955, appellee wrote Exhibit 15 (R. 111) to appellant which refers to “our contract for apricot kernels of 9/1/55”, recites the arrangements made with California Packing and asks what arrangements appellant has made to have the cracking done and to make delivery. Although this letter asks for a prompt reply, no reply was made to it (R. 112).

On October 26, 1955, Prince, Keeler & Co. wrote appellant Exhibit 16, (R. 113) in which it refers to the “double work, double talk and reconfirming on apricot kernels”.

Under date of October 31, 1955, appellant replied to Prince, Keeler’s letter of October 26, 1955, (Ex. 16). In this letter of October 31, 1955, (Ex. 17, R. 113) appellant writes:

“In reply to your letter of October 26, wish to advise you and you can advise American Almond Products Co. that we are trying to get the commitment from the man with whom we are working on the apricot kernels. We have not written you because we have nothing to tell you. We have called this man on the telephone every day for the past ten days asking him to come to the office but he has not done so and today we are turning the matter over to Mr. O’Connor to try to get a commitment from this man. We acted in good faith and I know the buyer bought in good faith, and that you sold in good faith, and we are going to do everything possible to get this matter settled within the next ten days.”

It is difficult to conceive of a more complete recognition and ratification.

Prince, Keeler & Co. Inc. informed appellee of this promise, (Exhibit 29, p. 1, R. 130) and appellee agreed to wait the ten days (Exhibit 40, R. 180).

On November 3, 1955, Prince, Keeler & Co. Inc. replied to appellant’s letter of October 31, 1955, as follows:

“We have your letter of October 31st, regarding American Almond Product’s apricot kernels. We appreciate your problem, and so does American Almond Products, but as the buyer pointed out, and we have to agree with him, he did not buy from ‘some man’, he bought the kernels from a reliable house, namely, Sunset-Sternau Food Company.” (Ex. 20, R. 121.)

Mr. Raymond J. O’Connor is both Chairman of the Board and attorney for appellant (Ex. 17).

At the request of Mr. Sternau, President of the company, Mr. O'Connor wrote several letters to Rudy Bonzi, in which the contract with appellee is expressly recognized and liability admitted. In Ex. 18 (R. 120), Mr. O'Connor writes:

"This office represents Sunset-Sternau Food Company in Modesto. We have been advised that you authorized the Company to sell on your behalf eighty-five tons of shelled apricot kernels.

The Company has made the sale per your instructions at seventeen and one-half cents per pound. The buyer is requesting that they be advised of the shipping date.

Efforts to reach you apparently have been unavailing for the past week. It is absolutely essential that you get in touch with the Company upon the receipt of this letter to complete this transaction. If this is not done it will expose both the Company and yourself to liability on the sale with the right of the Company to go against you for any losses that may be sustained by reason of non-delivery. Will you, therefore kindly get in touch with the company immediately upon receipt of this letter."

Under date of November 3, 1955, Mr. O'Connor again wrote a letter of similar import to Rudy Bonzi, which is Exhibit 23 (R. 123).

On November 4, 1955, Mr. Sternau wrote Exhibit 24, (R. 124) to Prince, Keeler & Co., Inc., in which it is stated:

"We have turned over to Mr. O'Connor all the information we have regarding the sale of apri-

cot kernels and we have placed it all in his hands. Be assured that we will cooperate in every way possible with American Almond Products *to get delivery.*”

On November 7, 1955, Prince, Keeler & Co. sent a copy of the foregoing letter to appellee, (Ex. 41, R. 181).

On November 11, 1955, Mr. O'Connor wrote Exhibit 28, (R. 127) to Prince, Keeler & Co. Inc. again referring to the contract and suggesting that a letter be written directly to Bonzi.

Just as appellant repeatedly recognized the existence of the contract, likewise did appellee (See Exs. 14, 15, 19, 20, 22, 26, 40) (R. 108, 111, 121, 121-122, 125, 180).

After successive promises of appellant to make delivery failed to materialize, Mr. Kaplan, on November 14, 1955, again came to California (R. 181). On November 14, 1955, Mr. Kaplan had a telephone conversation with Mr. Sternau in which Mr. Sternau promised delivery, and stated that he was having difficulties with Bonzi (R. 185-186). On the same day, Mr. Sternau wired Prince, Keeler & Co. Inc. that he had had a very nice talk with Mr. Kaplan. (Ex. 29, R. 130).

The following day, November 15, 1955, Mr. Kaplan and Mr. Eisner, attorney for appellee, went to San Jose and met with Mr. Sternau. Mr. Sternau stated that Bonzi had in his possession the uncracked pits from which the kernels could be delivered (R. 187).

On the same day a meeting was held in the office of the attorneys for Bonzi in San Jose at which both Mr. Sternau and Mr. Bonzi were present (R. 187-190). After lunch on the same day, another meeting was held in the office of Mr. Sternau, and at which Mr. Bonzi was present. Mr. Bonzi telephoned the California Packing Corporation for the purpose of getting a price for the crackout of the kernels. Mr. Carroll Glenny was not in and Mr. Bonzi stated he would contact Mr. Glenny the following morning, November 16, 1955 (R. 191).

On November 15, 1955, Mr. Kaplan left for New York.

On November 16, 1955, Mr. O'Connor advised Mr. Eisner that delivery would not be made (R. 332) and thereupon Mr. Eisner so advised Mr. Kaplan. This was the first time that appellee received notice or information directly or indirectly, that delivery would not be made (R. 193). The notification from Mr. O'Connor came after attorneys for Bonzi had written appellant Exhibit 32, refusing to crack the kernels or make delivery.

ARGUMENT.

The repeated recognition and ratifications of the contract made by appellant in writing, as well as orally, constitute a complete answer to the contentions urged on this appeal. They demonstrate that everything necessary to the creation of a contract binding appellant to make delivery had occurred. There must have been a meeting of minds, the sample

must have been approved, and it could not have been intended that the existence of the contract should be dependent upon the execution of a formal agreement. Otherwise, there would not have been either recognition or ratification.

IN ISSUING THE BOUGHT AND SOLD NOTES, PRINCE, KEELER & CO. INC., AS BROKER, ACTED AS THE AGENT OF BOTH SELLER AND BUYER, AND APPELLANT HAS IN WRITING RATIFIED ITS ACTION.

“A broker who negotiates a sale of goods, wares and merchandise is an agent of both parties for the purpose of making and signing a memorandum of the contract of sale.”

37 *C. J. S.*, page 705.

“The sale was made through a broker, and the terms thereof stated in a broker’s note received personally by plaintiff, and a duplicate copy mailed to defendant, which he claims was never received.

The learned trial court at the close of plaintiff’s case dismissed the complaint for lack of proof, which ruling we conclude constitutes reversible error. There was not alone ample proof to warrant the inference of receipt by plaintiff and defendant of the broker’s note, which in itself may be a valid contract of sale (*Newberry v. Wall*, 84 N. Y. 576), but there was proof, also, of a ratification thereof by defendant personally to plaintiff and admission of inability on his part to perform the same.”

Thomas Henderson & Co. Inc. v. Baron, 164 N. Y. Sup. 697.

Under the laws of the State of New York, a broker's memorandum is sufficient even if there be no written authorization or ratification. In California, however, Section 2309 of the Civil Code requires that the authority of an agent to enter into a contract required to be evidenced in writing, must also be in writing. This Honorable Court had occasion to consider a broker's memorandum and this particular section in the case of *Georgia Peanut Co. v. Famo Products Co.* reported in 96 Fed. 2d 440. The decision recognizes that in issuing a memorandum of sale the broker acts as agent of both buyer and seller, but that in order to comply with the Statute of Frauds of the State of California there must be either written authorization or written ratification of the broker's authority. In the case cited there was neither. The evidence in this case clearly proves the written ratification.

When Prince, Keeler & Co. Inc. forwarded the sold note to appellant, it referred to the document as the "contract", and the transaction as closed by its issuance (Ex. 7, R. 88). Appellant retained this "contract" without objection.

The undisputed testimony (R. 205, 218) is that it is the usual practice for such a broker's memorandum to be the sole evidence of a contract. In fact, brokers' memoranda in form identical to that issued in this case by Prince, Keeler & Co. Inc., and which were the sole evidence of the contracts, have been introduced into evidence (R. 294-296). Appellant itself developed that the bought and sold notes in this case are "the usual type of bought and sold notes used in New York City" (R. 287). Appellant conceded that

Prince, Keeler & Co. Inc. as broker, represented both parties to the transaction, but offered to prove that appellant had given special instructions to Prince, Keeler & Co. Inc. not to use the form of the ordinary bought and sold note used in New York City in connection with appellant's transactions (R. 292). Appellee objected to the introduction of such testimony and the Court properly sustained the objection (R. 291-294).

We have already indicated that appellant seeks to give the erroneous impression that appellee did not accept the bought note in the form in which it was issued, but wanted to modify the note by having inserted a clause that broken kernels should not exceed 5% by weight. (Opening Brief pp. 18-19). This assertion is not true (R. 160, 213-214). The request was made solely with respect to the proposed formal contract, which was returned to appellant by Prince, Keeler & Co. Inc. and retained by appellant without ever again requesting or suggesting that a formal contract be signed, and without ever disputing that the 5% tolerance clause was applicable. Only the proposed formal contract No. 2023 prepared by appellant was returned by the broker (Ex. 10, R. 94). The sale, as evidenced by the broker's memorandum, was confirmed and ratified in writing by appellant. The evidence of such repeated recognition, confirmation and ratification has already been set forth. More definite recognition and ratification can scarcely be imagined. There is no room for argument.

Ratification of the act of an agent is in all respects equivalent to prior authorization. The written recog-

tion and treatment of a contract executed by an agent as in force and effect is a compliance with the Statute of Frauds to the same extent as if the agent had prior written authorization.

The case of *Kelley-Clarke Company v. Leslie*, 61 Cal. App. 559, 563-4, 215 Pac. 699, 701-702, is directly in point:

“3. The second point is that there is no memorandum signed by defendants or their authorized agents, and that the contract is therefore void by reason of the statute of frauds. The record clearly shows a contract entered into between plaintiff and defendants through Davis in San Francisco and the Continental Brokerage Company in Chicago. It is the law that a complete contract, binding under the statute of frauds, may be gathered from letters, writings, and telegrams between the parties relating to its subject matter and so connected with each other that they may fairly be said to constitute one paper relating to the contract. (*Elbert v. Los Angeles Gas Co.*, 97 Cal. 244 (32 Pac. 9).)

4. Conceding that the telegrams contain all of the elements of a contract, nevertheless defendants contend that the contract yet lacks the greatest essential, to wit, the signature of the parties to be charged, either by the parties themselves or someone shown to be authorized by them. (Sec. 2309, Civ. Code.) By their signed telegram of August 5th, quoted above, defendants *treated* the contract as one made for them with plaintiff. Signed telegrams and letters between the parties incorporated by reference the previous telegrams constituting the contract. Defendants neither denied the contract nor repudiated the acts in

their behalf of the Continental Brokerage Company. In a letter written by defendants to plaintiff on August 14th, before the goods arrived in Chicago, wherein defendants seek to justify their position of interpreting the contract as one for *immediate shipment*, they say: 'We are sorry that a misunderstanding has arisen *but a contract is a contract.*' *It will thus be seen that while there was not an express ratification of the effect of the contract expressed in words, there was an express recognition that there was a contract. The uncontradicted evidence is that the respective parties recognized the transaction as one under a contract, the difference between them being as to whether the contract called for 'prompt shipment' or 'immediate shipment.'* As was said by our Supreme Court in *Ballard v. Nye*, 138 Cal. 588, 597 (72 Pac. 156, 159): 'Of course authority must be shown, but it need not be express authority; it may be implied, and one of the recognized legal methods of proving authority is by ratification. From such proofs the law implies previous authority to the same extent as if in the first instance it had been expressly conferred. The doctrine of ratification proceeds upon the theory that there was no previous authority, and that the relation of principal and agent did not in fact exist, but implies it from the acts and conduct of the parties, and when so implied, is equivalent to previous authority, and results as effectively to establish the relation of principal and agent as if the agency had been authorized in the beginning.' (Sec. 2307, Civ. Code: *Quinn v. Dresbach*, 75 Cal. 162 (7 Am. St. Rep. 138, 16 Pac. 762); *Ralphs v. Hensler*, 97 Cal.

301 (32 Pac. 243); *Pope v. Armsby Co.*, 111 Cal. 159 (43 Pac. 589); *Ford v. Lou Kum Shu*, 26 Cal. App. 203 (146 Pac. 199); *Anglo-California Bank v. Cerf*, 147 Cal. 393, 399 (81 Pac. 1080); *Union Trust and Realty Co. v. Best*, 160 Cal. 263, 267 (116 Pac. 737; *Phillips v. Phillips*, 163 Cal. 530, 535 (127 Pac. 346).)

In *Franklin Sugar Refining Co. v. Egerton et al.*, 288 Fed. 698, a letter written by the defendant requesting that shipment be not made, was held to be a sufficient recognition of the contract and a sufficient compliance with the Statute of Frauds.

“This letter of defendant, read in connection with the letter it answered, is a full recognition and acknowledgment of all the alleged contracts of sale, the number of barrels bought, the basis price of 22½ cents, and the time of delivery, and it meets the demands of the statute as fully as if the original memoranda of sale, including those of September and October, had been signed by the defendants. *A written recognition of the contract, expressed either in one writing or in several taken together, even with the request for release, refusal to perform the contract or the denial of its validity, is sufficient under the statute.* *Barry v. Coombe*, 1 Pet. 640, 7 L. Ed. 295; *Ryan v. United States*, 136 U.S. 68, 10 Sup. Ct. 913, 34 L. Ed. 447; *Drury v. Young*, 58 Md. 546, 42 Am. Rep. 343; *Louisville Co. v. Lorick*, 29 S. C. 533, 8 S. E. 8, 2 L. R. A. 212; *Colleton Realty Co. v. Folk*, 85 S. C. 84, 67 S. E. 156; *George Lawley & Son v. Buff*, 230 Mass. 21, 119 N. E. 186; 27 Corpus Juris, 257; 25 Ruling Case Law, 643.” (p. 702.)

In *Franklin Sugar Refining Co. v. William D. Mullen Co.*, 12 Fed. 2d 885, it was held that letters recognizing the existence of the contract and requesting changes in it, were a sufficient compliance with the Statute of Frauds:

*“We are clearly of opinion that these papers, signed by the defendant, recognizing the existence of the contract, and requesting changes of it, were a compliance with the statute that ‘some note or memorandum in writing of the contract or sale be signed by the party to be charged.’ We therefore hold, which holding is in accord with our holding in *Howell v. Witman-Schwartz Corporation*, 7 F. (2) 513, the court below erred in sustaining the demurrer, and its order must be reversed, and the cause remanded for further procedure in accordance with this opinion.”* (p. 889.)

In the case of *Howell v. Witman-Schwartz Corporation*, 7 Fed. 2d 513, it was held that an attempted repudiation of an agreement that is referred to will satisfy the statute:

“Admittedly the defendant in this case did not sign the order itself constituting the contract of sale. It was signed by Fred. B. Townsend Brokerage Co., brokers. If this were all, it might be necessary to show that the Townsend Brokerage Company was the agent of defendant. This might be done; but it is unnecessary, for defendant wrote and signed two letters referring to the contract. On July 27, 1920, it wrote to plaintiff as follows: ‘If possible cancel this car sugar, or if you cannot do this do not ship until last half August. We are loaded with sugar for some time

and cannot take it now. Please return contract with your reply.' On August 11, 1920, defendant again wrote plaintiff saying: *'Don't ship any sugar until we advise you, we have more now than we can finance.'*

While the 'note or memorandum' must be signed by the party charged, the instrument itself need not be signed. *The contract may be so referred to in a letter or paper signed by the party to be charged as to incorporate it therein by internal reference. Title Guarantee & Surety Co. v. Lippincott*, 252 Pa. 112, 97 A. 201; *Franklin Sugar Refining Co. v. Howell et al.*, 274 Pa. 190, 194, 118 A. 109; *Northwestern Consol. Milling Co. v. Rosenberg* (C.C.A.) 287 F. 785; *Beckwith v. Talbot*, 95 U.S. 289, 292, 24 L. Ed. 496; *Ryan v. United States*, 136 U.S. 68, 83, 10 S. Ct. 913, 34 L. Ed. 447. A letter will incorporate the unsigned contract by internal reference, and bind the defendant, even though he therein disclaims responsibility, if the fact of the consummated agreement appears therein and its terms are recognized. *Franklin Sugar Refining Co. v. John*, 279 Pa. 104, 110, 123 A. 685; *Franklin Sugar Refining Co. v. Egerton* (C.C.A.) 288 F. 698, 702.

*"The words, 'Please return contract with your reply,' refer to the contract of sale in question which was inclosed in the letter and was the only enclosure in it. The directions to 'Cancel this car sugar. Don't ship any sugar until we advise you'—refer to the sugar embraced in this contract, for plaintiff did not have any other order for the delivery of sugar to defendant. These letters are the clear recognition and adoption of the terms of the contract and the acknowledgment by defendant that it was bound thereby * * *"* (p. 514.)

In addition to repeated recognition of the contract, which establishes its validity, appellant is by its conduct estopped to repudiate the contract or rely upon the Statute of Frauds as a defense.

APPELLANT'S RECOGNITION OF THE CONTRACT AND PROMISES TO DELIVER CONSISTENTLY AND REPEATEDLY MADE AND RELIED UPON UNTIL NOVEMBER 16, 1955, ESTOP APPELLANT FROM EITHER REPUDIATING THE CONTRACT OR RELYING ON THE STATUTE OF FRAUDS AS A DEFENSE.

In the case of *George C. Beckwith v. Talbot*, 95 U.S. 289, 24 L.Ed. 496, 498, a contract was unsigned by the defendant but he wrote letters recognizing its existence. The Supreme Court said:

“We agree with the Supreme Court of Colorado that, in the fact of this evidence, produced by the defendant himself, he cannot deny the validity of the agreement. *His letters are a clear recognition of it. In them he refers to ‘the agreement’ again and again. He declares his intention to adhere to it, and to hold the plaintiff to it. . . .*” (p. 498.)

While appellant was assuring appellee of its intention to deliver and fulfil the terms of the contract, the market price of regular apricot kernels was constantly rising. On September 23, 1955, shortly after the fire, appellee was able to purchase regular apricot kernels at 28¢ per pound (R. 193) (Ex. 43, R. 259). The price constantly rose until at the time of refusal to deliver, the market price was 43¢ per pound. If it had not been for the promises and assurances of

appellant, appellee could and would have covered its requirements at the lower prices (R. 195). The conduct of appellant has caused appellee to act to its detriment in reliance thereon, and upon well established principles an estoppel results.

The case of *Moore v. Day*, 123 Cal. App. 2d 134, 140-141, 266 Pac. 2d 51, 55, is directly in point. In fact, it is on all fours, except that in that case it was the buyer who led the seller to believe that it would take delivery instead of the seller leading the buyer to believe that delivery would be made. In the meantime the market went down, and when the buyer refused to take delivery the price was substantially less than the seller could have received if he had not refrained from selling because of the defendant's promises. The principle involved is identical.

In the *Moore* case the Court said:

“Applying the well-settled principles hereinbefore set forth to the factual situation in the instant case we believe that the court's finding that appellant was estopped from availing himself of the statute of frauds is supported by the evidence and the law. The court was fully justified in concluding that appellant had made the offer for the beans and knew that respondents had accepted it, that respondents continued to rely on appellant's renewed assurances that he would complete the transaction from about March 1st to September 10th; that relying upon appellant's assurances respondents refrained from selling the beans to others and altered their position to their damage and loss. Under such circumstances the court had a right to believe that appellant was attempting

to use the statute of frauds as a sword and not as a shield."

That such affirmative acts relied upon by the opposite party to its detriment will give rise to an estoppel, is recognized in the case of *Georgia Peanut Co. v. Famo Products Co.*, 96 Fed. 2d 440, 441-442. To the same effect see *Pruitt v. Fontana*, 143 C.A. 2d 675, 687, 300 Pac. 2d 371, 379 and *Hunt Foods v. Phillips*, 248 F. 2d 28, 31-33.

THE SAMPLE WAS APPROVED.

The bought and sold notes recite that the sale is "subject to approval by buyer of two bags now en route as samples to buyer." As heretofore set forth, the conduct of the parties clearly recognizes the existence of a contract, and in so doing necessarily accepts as a fact that the sample had been approved. It was approved.

The 200 pound sample was requested so that appellee could make a production test of the kernels, manufacture them into paste and make macaroon cookies from the paste (R. 158-159, 282-283). The test was satisfactory and the sample was approved. The approval of the sample had absolutely nothing to do with the percentage of broken kernels that could or would be present in the delivery. This was clearly brought out by Mr. Kaplan, Mr. Engell and Mr. Ehrenfeld. Mr. Kaplan made no test with reference to the weight of broken kernels in the sample. He

observed, however, that it apparently contained more than permissible in a delivery of regular apricot kernels, and called this to the attention of Mr. Sullivan.

As explained by both Mr. Engell and Mr. Ehrenfeld, the sample received by appellee was what is known in the trade as a type sample, furnished to show the quality of the merchandise and nothing else (R. 241-243, 245-246, 265-266). Both of these witnesses testified that the sample furnished in this case was a type sample representative only of the quality of the nut meat, having absolutely nothing whatsoever to do with the percentage of broken kernels that could be present in the delivery. If there were no broken kernels in such a sample, the seller could still deliver broken kernels up to 5% by weight, and if there were more than 5% of broken kernels in the sample, the seller could deliver no more than 5% by weight.

We again emphasize that not only is this the testimony, but it is the undisputed and uncontradicted testimony. Appellant did not introduce an iota of evidence to refute the existence of the trade custom or the fact that the sample furnished was a type sample that had absolutely no bearing on the percentage of broken kernels.

Appellee approved the sample and appellant knew that it approved the sample. Its conduct is inconsistent with any other inference.

THE EXISTENCE OF THE TRADE CUSTOM AS FOUND BY THE TRIAL COURT WAS PROVED BY UNDISPUTED TESTIMONY. THIS CUSTOM WAS A PART OF THE CONTRACT, BINDING ON BUYER AND SELLER, WHETHER EXPRESSED OR IMPLIED.

That there is and for over thirty years has been a well established trade custom that regular apricot kernels can have no more than 5% by weight of broken kernels was proved by the testimony of Mr. Kaplan, Mr. Engell and Mr. Ehrenfeld as well as by the documentary evidence (R. 210, 283-284, 232-234, 256-259). It is the trade practice to sometimes express the tolerance in the contract and sometimes not to express it, but whether expressed or not expressed, regular apricot kernels can contain no larger percentage of broken kernels.

In treating this point, the appellant states that the testimony of Mr. Engell is in conflict with that of Mr. Kaplan and Mr. Ehrenfeld, in that Mr. Engell testified that it is the practice to include a clause covering this tolerance in the written contract. If there were such a conflict in the testimony it would be immaterial. It is sufficient if there is substantial evidence in support of the finding that is attacked. However, the conflict does not exist. Mr. Engell testified:

“Now the time of negotiations or confirmation of sale—it may be made by wire or telegram, and reference to that five per cent is not always in the telegram or wire because it is implied that regular apricot kernels would be shipped with not more than five per cent broken kernels by weight. It is established custom in the industry.” (R. 233.)

Mr. Engell also gave the following testimony:

“Q. Now, Mr. Engell, you testified that it is the practice, and I think your documents will show, for California Packing Corporation to expressly include in its contracts the tolerance of five per cent limitations of broken kernels by weight. Whether or not such a clause is expressly included in the contract, Mr. Engell, is it a fact that the same tolerance is implied whether expressed or unexpressed.

A. That is correct.” (R. 251.)

Mr. Engell has been with California Packing Corporation for about 28 years and Mr. Ehrenfeld has been with Rosenberg Bros. & Co. for about 40 years. Mr. Ehrenfeld testified as follows:

“Q. Let me ask you, Mr. Ehrenfeld, does this custom apply in the case of all sales of regular apricot kernels without setting forth the qualification in the contract?

A. It does.” (R. 257.)

The witness testified that it is generally the practice of Rosenberg Bros. & Co., which is the largest handler of apricot kernels (R. 255), not to include any mention of the tolerance. The witness was shown Exhibit 43, which is a contract dated September 23, 1955, between Rosenberg Bros. & Co. Inc. as seller, and appellee as buyer, of regular apricot kernels. There is no mention of the tolerance in this contract. The contract was shown the witness and the following question asked and answer given:

“Q. And whether it mentions that or not, that tolerance would be implied, is that correct?

A. It would be implied.” (R. 259.)

Both Mr. Engell and Mr. Ehrenfeld testified that the Dried Fruit Association of California will not issue a certificate passing a delivery of regular apricot kernels in which the percentage of broken is in excess of 5% by weight (R. 233, 260).

Exhibit 44 (R. 296) is a contract dated August 26, 1955, for regular apricot kernels in which Sewell S. Brown & Company is the seller and appellee the buyer, and in which the tolerance is not mentioned.

Exhibit 45 (R. 297) is a contract for regular apricot kernels wherein Mayfair Packing Co. is seller and appellee buyer, and in which there is no mention of the tolerance.

Exhibit 46 (R. 298) is a contract in which the California Prune and Apricot Growers Association is seller. The tolerance is mentioned in the broker's bought note and omitted in the formal agreement.

The testimony and the evidence conclusively demonstrate that according to a long and well established custom of the trade, regular apricot kernels cannot include more than 5% of broken by weight; that this custom is a part of every contract; that it is sometimes included as an express term of the contract, sometimes and probably more frequently, omitted, but whether expressed or implied it is always a part of the contract.

Appellant argues that the custom should not be applicable in this case because this was the first sale of apricot kernels that appellant had made and that it was ignorant of the custom. There are two answers to this contention. Appellant was not ignorant of the

custom, and if it were ignorant, it would still be binding upon it.

We have already pointed out that on receiving Prince, Keeler's letter of September 8, 1955, (Ex. 10, R. 94), Mr. Sternau made no inquiry to ascertain whether this tolerance was a "recognized condition of sale of this particular item;" (R. 96, 316-317), never questioned nor disputed that this was the fact and did not reply to this letter until September 21, 1955 (Ex. 11, R. 98). In this reply, which was written immediately after the fire, Mr. Sternau does not question the existence of the trade custom but states that the "packer" "is having a very difficult time in shelling these and would like to get out of this contract this season." The only true statement made in this letter was the fact of the desire to get out of the contract. The "packer", Bonzi, had never shelled or attempted to shell these or any other kernels (R. 319). The assistance of California Packing Corporation to shell the kernels was refused (R. 323) and there was just as much sincerity in the letter of Mr. Sternau as in the letter of the attorneys written on behalf of Bonzi (Ex. 32, R. 134) in which it is stated that "Mr. Bonzi is of the opinion that he is unable to crack any apricot pits during this season and thus is unable to deliver any apricot kernels to you or to your purchaser, the American Almond Products Co. Inc." This letter was written after Mr. Engell had actually gone to the premises of Mr. Bonzi to make arrangements for California Packing Corporation to do the cracking and Mr. Engell saw the uncracked pits strewn on the premises of Bonzi (R. 238-241). Furthermore, as

testified by both Mr. Engell and Mr. Ehrenfeld, the reduction of the broken pieces to a maximum of 5% is purely a mechanical process of taking out and removing any excess (R. 235, 260).

Again, although Mr. Sternau testified that this was the first sale of apricot kernels made by appellant, he admitted that appellant had for years been engaged in the same business as that of appellee, that of making the kernels into paste for the bakery trade, and that in carrying on this trade appellant had necessarily made innumerable purchases of apricot kernels (R. 314-315). Appellant still had on its premises machinery for the manufacture of the paste when Mr. Kaplan called on November 15, 1955, and Mr. Sternau offered to sell this machinery to appellee (R. 191-192). Moreover, Mr. Sternau did not testify that appellant did not know about the custom. The full extent of his testimony was that appellant was new in the business of selling apricot kernels.

In the second place, the general trade custom would be a part of the contract and binding upon appellant, whether or not it knew of the custom. This principle is clearly set forth by the Supreme Court of California in the case of *Miller v. Germaine Seed Etc. Co.*, 193 Cal. 62, 69-70, 222 P. 817, 820:

“The rule that a person will be presumed to have contracted with reference to a general custom or usage whether he knew of that custom or not has frequently been invoked. In *Steidtmann v. Joseph Lay Co.*, 234 Ill. 84 N.E. 640), it was said (pp. 88, 89): ‘A person entering into a contract in the ordinary course of business is

presumed to have done so in reference to any existing general usage or custom relating to such business. (*Collins Ice Cream Co. v. Stephens*, 189 Ill. 200 (59 N.E. 524); *Chisholm v. Beaman Machine Co.*, 160 Ill. 101 (43 N.E. 796); *Leavitt v. Kennicott*, supra.) And this is so whether he knew of the custom or not. (*Samuels v. Oliver*, 130 Ill. 73 (22 N.E. 499); *Taylor v. Bailey*, 169 Ill. 181 (48 N.E. 200); *Lyon v. Culbertson*, 83 Ill. 33; *Doane v. Dunham*, 79 Ill. 131; *Bailey v. Bensley*, 87 Ill. 556.)”

See also *Pastorino v. Greene Bros.*, 90 Cal. App. 2d 841, 204 P. 2d 386, 370.

It is apparent how absurd it would be if this were not the law. When Mr. Sternau offered to sell the apricot kernels to appellee, he stated that the price would be “competitive” (R. 73, 80, 42). The price of 17½¢ per pound was based on the opening price for regular apricot kernels. At the same time that appellee made the purchase from appellant it made other purchases of regular apricot kernels at exactly the same price (Exs. 37, 44, 45, 46, R. 157, 296, 297, 298). All those selling regular apricot kernels were bound to deliver and did deliver not in excess of 5% by weight of broken kernels. The suggestion that anyone could assume to engage in this trade, contract to sell regular apricot kernels at the prevailing market price and yet not be bound to deliver a product equal in quality to that called for by that price, on the basis that he was new at the business and did not know the quality called for, is nothing less than absurd. The absurdity is demonstrated by the testi-

mony of Mr. Sternau (R. 325, 326). If anyone engages in a business he is bound to know and is bound by the well-established customs applicable to that business.

The contention that the custom is not a part of the contract because Mr. Kaplan expressed a desire that it be added as a part of the formal contract, is equally unsound. The custom existed and was applicable whether expressed or implied. Appellee purchased regular apricot kernels. It agreed to pay the price of regular apricot kernels. It expected and was entitled to delivery of regular apricot kernels. An excess of broken kernels would render the delivery unusable for appellee's purposes. Broken kernels have only a fraction of the value of whole kernels and are usable only for pressing of oil. Appellant did not become entitled to deliver anything other than regular apricot kernels because Mr. Kaplan requested that the exact description of regular apricot kernels be included in the formal contract, if one was executed, for that is all his request amounted to.

**THE EXISTENCE OF THE CONTRACT WAS NOT DEPENDENT
ON THE EXECUTION OF A FORMAL WRITTEN AGREEMENT.**

This, of course, is a question of intent to be determined from all the evidence in the case, and the trial Court has found adversely to appellant's contention. The evidence fully supports the finding.

The broker's memorandum recites upon its face "this memorandum shall be subordinate to a more

formal contract if and when such a contract is executed; in the absence of such contract, this memorandum represents the contract of the parties.”

No more formal contract was executed; the memorandum was accepted and retained by both parties, and according to its terms represents the contract of the parties.

It is fundamental that there is no more reliable rule by which to determine the intent of the parties than their own conduct.

Appellant’s repeated and consistent recognition of the existence of this contract and promises to perform it completely disprove any intention that there should not be a contract unless a formal instrument was executed. One cannot blow hot and blow cold. One cannot recognize and promise to perform a contract and at the same time deny its existence.

In the case of *Gibson v. De La Salle Institute*, 66 Cal. App. 2d 609, 630, 152 P. 2d 774, 786 wires of both buyer and seller recited that a formal contract would be prepared and signed. None was prepared or signed and the Court said (page 630):

“It is said in 17 Corpus Juris Secundum 391, that whether an informal agreement which, according to the understanding of the parties, is to be reduced to writing, takes effect as a complete contract at once, or only when a formal written contract is executed, depends upon the intention of the parties as construed from the facts of a particular case. In *Thompson v. Schurman*, 65 Cal. App. 2d 432, 440 (150 P. 2d 509), this court held that where the parties agree upon the terms

and conditions of a contract with the mutual intention that it shall thereupon become binding, the mere fact that a formal written agreement to the same effect is thereafter to be prepared and signed does not alter the binding validity of the original contract; and that whether an oral agreement should take effect forthwith as a completed contract depends upon the intention of the parties, and that such intention is to be determined by the surrounding facts and circumstances of each particular case. (Also see *Billings v. Wilby*, 175 N. C. 571 (96 S. E. 50, 51), and cases there cited).

In the case of *Lawrence v. Milwaukee etc., R. Co.*, 84 Wisc. 427 (54 N.W. 797), which the Court cites and quotes from in the *Gibson* case (p. 625), although the correspondence between the parties recited that a contract would be prepared, the Court "considered the subsequent conduct of the parties shown by parol evidence as indicating that both parties supposed that a contract existed."

In the case at bar the conduct of all the parties, appellant, its counsel, Prince, Keeler & Company as well as appellee, shows conclusively that all parties regarded the contract as existing and in effect.

Mr. Kaplan gave as reasons that he did not consider the execution of any more formal contract as necessary, the following:

"The Court. What reasons do you have in mind?

A. Number one: To the best of my recollection I had received similar bought and sold—or in my case I would receive bought note copies. To the best of my recollection Prince-Keeler had

confirmed several purchases I had made from Sternau—Sunset-Sternau Company—using different forms of such confirmation. That is point one.

Point two is that I—as a buyer, American Almond, had made many purchases of apricot kernels from other sellers in California where this broker's confirmation was the sole written evidence of a contract without any subsequent confirmation of a more formal contract.

It was very normal for me to assume a great possibility that this would be the final written confirmation, because on its face it reads, among other things, on the top, number one:

‘If incorrect, advise immediately.’

Number two, on the bottom—if I can find it here in a moment—under the clause of arbitration on this very document:

‘Any controversy or claim arising out of or relating to this contract shall be arbitrated before the Association of Food Distributors, Incorporated, New York City. This memorandum shall be subordinate to a more formal contract if and when such contract is executed. In the absence of such contract, this memo represents the contract of the parties; seller guarantees to conform to National Pure Food Laws.’

And, as I said previously, I had many purchases of apricot kernels from California where such a broker's memorandum was the sole written confirmation.” (R. 205-206)

THERE IS MUTUALITY OF REMEDY.

It is difficult to understand appellant's contention in this respect. Certainly appellee, over and over

again, just as appellant, recognized the existence of this contract, offered performance and demanded performance. This was done repeatedly, both orally and in writing. The following question and answer were given:

“Q. (By Mr. O’Connor). Mr. Kaplan, did you ever sign or did any other officer of American Almond Company ever sign any writing with Sunset-Sternau Food Company for the purchase from Sunset of 75 tons of apricot kernels in the year 1955?

A. I have signed some writings, yes. There are letters. If you refer to the word ‘writings’, we have a great deal of correspondence between the parties here, all of which are writings referring to such a transaction, and we have signed many such writings—at least I have.” (R. 218).

The writings referred to are in evidence.

If appellant had made a tender or if appellee had failed or refused to perform, as did appellant, a right of action would certainly have existed.

On page 35 of its opening brief, appellant states that the record reveals that appellant was unable to meet the “5% clause”, and that this was uncontradicted. This would not be a defense if it were true, but it is not true. The claim of inability to meet the 5% clause was sham and a mere excuse first to attempt to get out of the contract and thereafter for delay. Appellant was given the opportunity to have the California Packing Corporation do the cracking and did not have sufficient interest to even contact the California Packing Corporation (R. 323).

It is also the law that the writing, if one is required, need only be signed by the party to be charged, and lack of mutuality is not a defense.

Cowan v. Tremble, 111 Cal. App. 458, 462-463, 296 Pac. 91, 93.

“Moreover, contracts within the statute of frauds need be subscribed only by the party to be charged or his agent (Civ. Code, sec. 1624), and may be enforced notwithstanding they are not signed by the plaintiff or his authorized agent (*Cavanaugh v. Casselman*, 88 Cal. 542 (26 Pac. 515); *Scott v. Glenn*, 98 Cal. 168 (32 Pac. 983)). Nor does this rule render the contract liable to the objection of a lack of mutuality, for by bringing the suit the plaintiff binds himself to abide by the judgment of the court (*Harper v. Goldschmidt*, 156 Cal. 245 (134 Am. St. Rep. 124, 28 L.R.A. (N.S.) 689, 104 Pac. 451); *Allen v. Dailey*, 92 Cal. App. 308 (268 Pac. 404); Williston on Contracts, sec. 140, p. 314).”

CONCLUSION.

It is respectfully submitted that the findings of the trial Court are fully supported by the evidence and that the judgment should be affirmed.

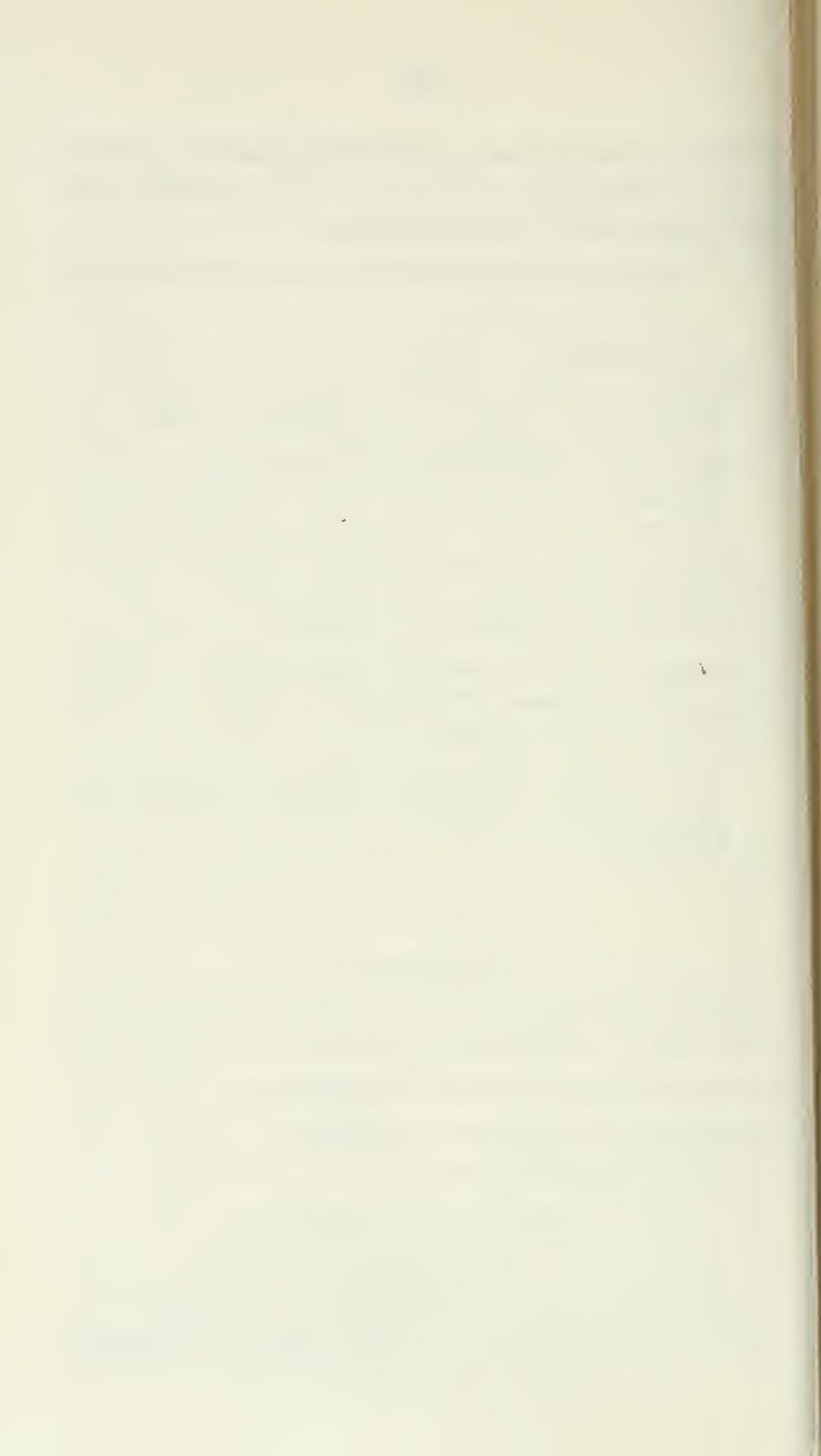
Dated, San Francisco, California,
April 22, 1958.

Respectfully submitted,

EISNER & TITCHELL,

By NORMAN A. EISNER,

Attorneys for Appellee.



No. 15,690

United States Court of Appeals
For the Ninth Circuit

SUNSET-STERNAU FOOD CO.,
a corporation,

Appellant,

vs.

AMERICAN ALMOND PRODUCTS CO., INC.,
a corporation,

Appellee.

APPELLANT'S REPLY BRIEF.

RAYMOND J. O'CONNOR,
185 Post Street, Fourth Floor,
San Francisco 8, California,

Attorney for Appellant.

FILED

JUN - 4 1958

PAUL P. O'BRIEN, CLERK



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**United States Court of Appeals
For the Ninth Circuit**

Appellee.

APPELLANT'S REPLY BRIEF.

PRELIMINARY OBSERVATIONS.

An examination of appellee's reply brief reveals a stress upon certain evidence favorable to its case and a complete disregard of the evidence unfavorable to it.

Upon appellee rested the burden of proving its case.

Yet, in its brief it failed to comment upon the evidence needed to support its contentions and the findings in the following respects:

1. That it rejected appellant's formal contract and the "note" (P. Ex. 9, 10). Yet this is evidence produced by appellee and they are bound by it.

2. That both parties understood a formal contract was to be signed; that Mr. Kaplan so understood such transaction (T. p. 163, 4).

3. That a trade custom attached to and became part of the "note" dated September 1, 1955. Their own evidence refutes such attachment (P. Ex. 10). They pass over the rejection of the formal contract of appellant and their demand that the "5% clause" be included in the "note" by stating, in their brief, p. 10, "Mr. Kaplan stated that he would *prefer* that it be expressly stipulated . . ."

4. That there is not one iota of evidence in the record to sustain that part of Finding No. 4, that Prince Keeler was the "agent" of appellant—and of appellee. They do not comment upon the admission of lack of such authority by Prince Keeler in their own exhibits (P. Ex. 10, 16).

5. More important, however, Appellee does not comment upon or try to distinguish the authorities cited by appellant in support of its position.

Relying, therefore, upon our previous statement of fact, argument and citation of authority, appellant feels it should analyze the authorities cited by appellee.

ANALYSIS OF AUTHORITIES CITED BY APPELLEE.

1. On page 20 of its brief a statement is taken from 37 *C.J.* 5, p. 705, that a broker who negotiates a sale is an agent of both sides for the purpose of making and signing a memorandum of the contract of sale.

Obviously, this is cited to sustain the claim that Prince Keeler was the agent of appellant and bound appellant by the "note" of September 1, 1955 (P. Ex. 8).

This case was tried upon the basis California law applied.

Sections 2309 and 1724 of the Civil Code and 1973 (a) of the Code of Civil Procedure of California require such authority to be in writing. There is no evidence in the record that such authority was ever given.

2. *Thomas Henderson & Co. Inc. v. Baron*, 164 N.Y. Supp. 697 (1917). In this case the Appellate Court ordered a new trial of the case on the basis that certain evidence was excluded which would have attempted to show the broker's authority to bind the defendant. The Court stated by way of dicta in this case where the broker mailed out a "broker's note" in connection with this sale that it constituted a valid contract of sale. Significantly, however, there was no Statute of Frauds in existence in that state as there is in California. There was no judgment on the merits as such in that controversy.

3. *Georgia Peanut Co. v. Famo Products Co.*, 96 Fed. (2d) 440. In this case the Court recognized that the Statute of Frauds governs insofar as the ability of an agent to bind a principal and that this authority must be in writing. The question of estoppel to set up the Statute of Frauds as a defense was discussed. In light of the evidence produced it was rejected. We feel that the same reasoning should

apply in the instant case in view of appellant's letter of September 21 (P. Ex. 11).

4. *Kelley-Clarke Company v. Leslie*, 61 Cal. App. 559. Appellant contends that case is not in point. In that case the evidence was complete that an agency was in existence binding upon the plaintiff and that the terms of the contract were complete and expressed in writing. It differs from the instant case in that Prince Keeler has been demonstrated to be only a middleman by its own admissions and the contract terms, if such they be, expressed in the "note" of September 1, 1955, is incomplete (1) because appellee insisted that there be written into that "note contract" the five percent clause, and (2) the terms insisted upon in appellant's formal contract which appellee refused to sign must likewise be construed as part of the contract which appellee understood it would be bound by when and if signed.

Moreover, Prince Keeler, in the instant case, at all times recognized they were not the agent of appellant and could not bind appellant (P. Ex. 10, 16).

5. *Franklin Sugar Refining Co. v. Egerton, et al.*, 288 Fed. 698 (1923). In this case the terms of the contract were complete in the writings as to price, quality and delivery which was elastic as to the seller. The Court held that the defense's contention that the contract was uncertain as to price and quality was not true; that the letters between the parties interpreted in the language of the particular trade, definitely fixed the price and quality *and that defendant fully under-*

stood the trade terms used. Concerning the defense of the Statute of Frauds the Court held that all terms of the contract were in writing in various letters exchanged between the parties—not through a middleman.

This case differs from the instant case in that it is fully established that appellant did not understand, in this new business, the trade terms, that appellee did not rely upon trade and custom insofar as the five percent clause is concerned and that appellant could not meet the condition of the five percent clause and that appellee did not waive it after having demanded that it be made a part of the written contract to be executed between the parties to this action.

6. *Franklin Sugar Refining Co. v. Muller*, 12 Fed. (2d) 885. In this case the Court invoked the parole evidence rule to use trade custom and usage to interpret the meaning of the words of the contract—*not to add a term or condition to the contract*. The Court said:

“In the present case we are not writing into the contract something that is not in it, but we are finding the meaning of the terms used in the contract, which presumably were placed there by the parties because they meant something; and to each of them we are bound to give force and effect under the familiar rules of construction” (p. 887, par. 2).

The Court held and went on to say that both plaintiff and defendant “well knew, before and at the time of the making of said contract, the trade usage and custom.”

This case was on demurrer of the defendant which had been sustained by the Trial Court; the Appellate Court reversed the ruling on the demurrer without deciding the merits of the controversy.

7. *Howell v. Witman-Schwartz Corporation*, 7 Fed. (2d) 513. In this case we have essentially the same situation that existed in the two previously cited cases. All terms of the contract were agreed upon in the exchange of letters between the parties though no formal contract was signed.

8. *Beckwith v. Talbot*, 95 U.S. 289 (24 L.Ed. 496). Again, in this case the terms of the contract were certain, agreed to by all parties in letters between the parties and the contract enforced.

9. *Moore v. Day*, 123 Cal. App. (2d) 134 (1954). This case discloses a factual situation far different than in the instant case:

“The Court there found Gilligan, *a broker, was in fact the agent of appellant*, that the broker, for many years had purchased beans for appellant, on a commission basis, the custom being for appellant to advise broker how much he would pay for a certain quantity of beans and if terms were satisfactory, Gilligan, the broker would obtain a written contract of sale and purchase. Respondents were fully familiar with the practice of executing a written contract covering transactions entered into with a broker through his agent.”

The Court also found in this case that buyer continually told seller he would accept the beans bought and then the price dropped—but it also found that

the terms of the contract were complete and both parties in accord and both parties capable of completing the contract per its terms.

This is not true in the instant case—where appellant was not able to complete the contract at any time under the five percent clause—nor was this clause accepted by appellant or waived by appellee—nor were terms of appellant's contract accepted in other respects by appellee.

Appellee attempts to prove the existence of a contract by stating that appellant retained the "note" of Prince Keeler without objection (Appellee Brief, p. 21).

This statement is a fallacy and appellee knows it to be so. This "note" was retained as a "memo" in the ordinary course of business, such as a letter or telegram, and appellant responded to it by sending Prince Keeler its formal contract which appellee refused to sign unless there was written into it the five percent clause.

Appellee further states that "the undisputed testimony is that it is a usual practice for a broker's memo to be the sole evidence of a contract" (Appellee Brief, p. 21).

This is another misstatement. Mr. Engell, in his testimony stated:

"Q. Mr. O'Connor. Would you mind showing me that contract you referred to, Mr. Engell?

A. *This is the memorandum of sale from which the contract is written up*" (R. 244).

10. *Miller v. Germain Seed Etc. Co.*, 193 Cal. 62, 222 P. 817. In this case appellee quotes language out of the context.

This case involved a purchase of seed by plaintiff from defendant. The seed turned out to be different from the specific type requested. Plaintiff sued for damages for breach of warranty. The Court held that the trial Court should have given an instruction to the jury, in the light of evidence produced by defendant, to the effect that in the sale of seed there is a general and universal custom and usage of the trade that seed is not sold on warranty.

The Court did say, however, just prior to plaintiff quotation, p. 69:

“To be regarded as part of a contract, however, the usage or custom must have both of the foregoing elements (i.e. custom not inconsistent with the contract and of such general and universal application that a person is conclusively bound by it).

(1) It must be actually or constructively known and

(2) It must be consistent with the contract.”

In this case the Court held that plaintiff could not impose upon defendant a contract of warranty it never intended to make because of ignorance of a custom.

However, in the present case we do not have a general or universal custom; we do not have knowledge of the custom by appellant, known to appellee to be so, *but we do have total nonreliance of appellee upon*

such custom by his request it be added to the contract and inability of appellant to deliver under such clause expressed and transmitted to appellee.

11. *Pastorine v. Green Bros.*, 90 Cal. App. (2d) 841, 204 P. (2d) 386. In this case the question involved *interpretation* of contract terms through usage and custom, not the attempt to add terms to a contract. Also, familiarity with custom and usage through long previous study of the particular industry (fishing industry) was concluded by the Court.

Significantly, appellee does not reply to the contention of appellant that appellee himself did not depend, or choose to depend on the "custom" as adding an unwritten condition to the alleged "note" contract, but demanded that such "custom" be written into the "note" and the formal contract of appellant. Appellee blithely skips past this contention by stating merely ". . . Mr. Kaplan expressed a desire that it be added to the formal contract . . ."

Yet, because of Mr. Kaplan's demand, he refused to sign the formal contract of appellant—and appellant refused to alter it or give authority to Prince Keeler to insert it in the alleged "note" contract of September 1, 1955.

12. *Gibson v. De La Salle Institute*, 66 Cal. App. (2d) 609, 152 P. (2d) 774. This case, cited by plaintiff, is not in point.

The Trial Court had granted a motion for summary judgment in favor of defendant, holding that the telegrams between the parties did not disclose a complete

contract, that it was within the Statute of Frauds and that approval of samples, following the exchange of telegrams, was indicated.

The Appellate Court held that the use of the summary judgment proceedings was a drastic remedy and not to be invoked where there was any real issue of fact before the Court.

Also, that when parties agree upon complete terms of a contract, a formal written contract may, or may not, be necessary, but that the Court should take evidence to determine this fact which it could not do in such a summary proceeding.

Also, that there was a serious question re samples being sent and approved as a condition precedent to the contract; that this was a matter in dispute and could only be determined by evidence being taken to determine the intention of the parties.

Thus the issues there were far different than those of the instant case, the main point decided being that when there are disputed issues the Appellate Court says the summary judgment remedy should not be invoked but that a full trial be given on those issues.

13. *Thompson v. Schurman*, 65 Cal. App. (2d) 432, 150 P. (2d) 509. This case is not in point. A far different factual situation was involved. This was an appeal from an order granting a new trial. Action was brought to recover money paid upon an oral contract that the parties considered binding. The contract was within the Statute of Frauds, involving the purchase and sale of real estate. However, the Statute

of Frauds was not pleaded. Basis of the action was fraud and misrepresentation and the trial Court found against such charge.

**APPELLEE'S THEORY OF THE CASE IS NOT SUSTAINED
BY THE EVIDENCE OR LAW.**

Appellee's theory of liability has rested upon the following:

1. That Prince Keeler was the agent of appellant and bound appellant by its "note" contract. It is respectfully submitted that this was not true; that appellant's contentions, detailed in its opening brief, are correct. Appellee has not answered those contentions.

2. That a trade custom re the "5% clause", unwritten, attached itself to the alleged "note" contract to make it complete.

It is respectfully submitted that the evidence and authorities set out in appellant's opening brief are correct and that, in this case, such trade custom did not attach, as an unwritten condition, to complete the "note" contract. Further, appellee has not successfully answered the facts and authorities heretofore submitted by appellant.

3. That there was a ratification by appellant of the "note" contract.

It is respectfully urged that ratification can only be operative when all the terms and conditions of the agreement are definite and certain and agreed to by all parties. Such is not the case here.

The "5% clause" was not agreed to by appellant. Nor were the terms of appellant's formal contract (P. Ex. 9) agreed to by appellee. Again, appellee did not agree to the "note" contract in the absence of incorporation therein of the "5% clause".

**THE PARTIES CONTEMPLATED THE EXECUTION OF A
FORMAL WRITTEN CONTRACT BETWEEN THEM.**

It is respectfully urged that the evidence and authorities previously submitted in support of this proposition by appellant have not been met by appellee.

A mere reading of appellant's formal written contract, (P. Ex. 9) discloses terms and conditions not mentioned in the negotiations or the alleged "note" contract, to say nothing of the failure of inclusion of the "5% clause".

In *Fly v. Cline*, 49 Cal. App. 414 (193 P. 615), the Court states:

"It also is elementary law that, unless the agreement to execute the future contract be definite and certain upon all the subjects to be embraced, so that nothing is left for future negotiation, it is nugatory."

122 *American Law Reports*, p. 1251, *et seq.*;

Kessinger v. Organic Fertilizers, Inc., 151 Cal.

App. (2d) 884, 312 P. (2d) 345.

CONCLUSION.

Appellant respectfully submits the judgment should be reversed.

Dated, San Francisco, California,
June 3, 1958.

Respectfully submitted,
RAYMOND J. O'CONNOR,
Attorney for Appellant.

No. 15695

United States
Court of Appeals
for the Ninth Circuit

ST. PAUL FIRE AND MARINE INSURANCE
COMPANY, a Corporation,

Appellant,

vs.

HOMER CUNNINGHAM, JESS GULLETT and
PERCY LAUDINGHAM,

Appellees.

Transcript of Record

Appeal from the United States District Court for the
Northern District of California,
Southern Division.

FILED

NOV 15 1957

PAUL P. ...

No. 15695

United States
Court of Appeals
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ST. PAUL FIRE AND MARINE INSURANCE
COMPANY, a Corporation,

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF COUNSEL

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For Appellant.

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San Francisco, California,
For Appellees.

In the United States District Court for the Northern District of California, Southern Division

No. 35780

ST. PAUL FIRE AND MARINE INSURANCE
COMPANY, a Corporation,

Plaintiff,

vs.

HOMER CUNNINGHAM, JESS GULLETT,
PERCY LAUDINGHAM, FIDELITY AND
CASUALTY COMPANY OF NEW YORK, a
Corporation; FIRST DOE, SECOND DOE,
THIRD DOE,

Defendants.

COMPLAINT FOR DAMAGES

Comes now the plaintiff above named and complains of defendants, Homer Cunningham, Jesse Gullett and Percy Laudingham, and for cause of action alleges:

I.

That the St. Paul Fire and Marine Insurance Company was at all times herein mentioned and now is a corporation organized and existing under and by virtue of the laws of the State of Minnesota and was and now is a resident of said State; Fidelity and Casualty Company of New York was and now is a corporation organized and existing under and by virtue of the laws of the State of New York and was and now is a resident of said State; Homer

Cunningham, Jess Gullett and Percy Laudingham, were and now are residents of the State of California.

II.

That the true name or capacities of the defendants sued herein under fictitious names, whether individual, associate, corporate or otherwise, are unknown to plaintiff, and in this respect and in these regards plaintiff prays leave to insert the true names of each of said defendants when determined, and to change them accordingly.

III.

That plaintiff is informed and believes and upon such information and belief alleges that defendants First Doe, Second Doe, Third Doe are not now and were not at any time herein mentioned residents of the State of Minnesota.

IV.

That at all times herein mentioned the aforesaid corporate defendant was doing business in the Northern District of California.

V.

That on or about the 9th day of March, 1951, Homer Cunningham, Jess Gullett and Percy Laudingham, and each of them, while acting within the course and scope of their employment by Ben Mast Lumber Company so negligently and carelessly used and loaded a truck owned by George Green, that as

a direct and proximate result of the combined and concurring negligence of the defendants, and each of them, Wilbur C. Rasmussen was killed.

VI.

That on the 9th day of March, 1951, there was in full force and effect a written policy of public liability insurance issued by plaintiff to Ben Mast Lumber Company, which said policy extended coverage to Ben Mast Lumber Company for liability incurred by reason of the aforesaid negligence of Homer Cunningham, Jess Gullett, Percy Laudingham, and each of them.

VII.

That on or about the 8th day of March, 1952, Laretta R. Rasmussen, the widow of Wilbur C. Rasmussen, individually and as guardian, ad litem, of her two minor children, Judy Rose Rasmussen and Gary Roy Rasmussen, commenced suit in the Superior Court of the State of California, in and for the City and County of San Francisco, against the Ben Mast Lumber Company and its employees, alleging that Laretta R. Rasmussen was the widow of Wilbur C. Rasmussen, deceased; and that Judy Rose Rasmussen and Gary Roy Rasmussen were the children of said Wilbur C. Rasmussen, deceased, and that Laretta R. Rasmussen, Judy Rose Rasmussen and Gary Roy Rasmussen were the sole surviving heirs at law of Wilbur C. Rasmussen, deceased; that Wilbur C. Rasmussen, deceased, sus-

tained severe personal injuries from which he died on March 10, 1951, as a result of the negligence of the employees of the Ben Mast Lumber Company acting within the course and scope of their employment by the Ben Mast Lumber Company; that said action thereafter proceeded to trial and a judgment was entered in favor of the plaintiff and against the Ben Mast Lumber Company on June 29, 1955, in the sum of Seventy-five Thousand Dollars (\$75,000.00); that said sum was paid by plaintiff on behalf of the Ben Mast Lumber Company on August 17, 1956.

VIII.

That plaintiff has necessarily incurred attorney's fees in the trial and defense of said action in the amount of Four Thousand Two Hundred Fifty Dollars (\$4,250.00) which is the reasonable value thereof; in addition thereto, plaintiff has been forced to expend the further sum of One Thousand Thirteen Dollars Sixty-two Cents (\$1,013.62) for legal costs and expenses.

And for a Further, Separate and Second Cause of Action, Plaintiff Complains of Defendant Fidelity and Casualty Company of New York, a Corporation, and for Cause of Action Alleges:

I.

Plaintiff incorporates herein as though specifically set forth in full, all of the allegations contained in paragraphs I, II, III, IV, V, VI, VII.

II.

That on the 9th day of March, 1951, there was in full force and effect a written policy of public liability insurance issued by defendant to George Green, which said policy extended coverage to Homer Cunningham, Jess Gullett, Percy Laudingham and the Ben Mast Lumber Company, and obligated said defendant to defend Homer Cunningham, Jess Gullett and Percy Laudingham and the Ben Mast Lumber Company against the suit instituted against them by Laurretta A. Rasmussen, individually as the widow of Wilbur C. Rasmussen, deceased, and as guardian ad litem of decedent's two minor children, Judy Rose Rasmussen and Gary Roy Rasmussen, and to pay any judgment thereon.

III.

That prior to making payment, plaintiff made a written demand upon defendant to pay said judgment; costs and attorney's fees, but defendant wrongfully refused to pay.

Wherefore, plaintiff prays judgment against defendants and each of them as follows:

1. That plaintiff have judgment against the defendants and each of them in the sum of Seventy-five Thousand Dollars (\$75,000.00), together with attorney's fee in the sum of Four Thousand Two Hundred Fifty Dollars (\$4,250.00); and legal costs and expenses in the sum of One Thousand Thirteen Dollars and Sixty-two Cents (\$1,013.62).

2. Costs of suit.

3. For such other and further relief as to the Court may seem just and proper.

/s/ JAMES P. SHOVLIN, JR.,
Attorney for Plaintiff.

Duly verified.

[Endorsed]: Filed August 23, 1956.

[Title of District Court and Cause.]

MOTION TO DISMISS

To the Plaintiff, St. Paul Fire and Marine Insurance Company, a Corporation, and to James Shovlin, Its Attorney:

You and Each of You Will Please Take Notice that the undersigned will, on the 11th day of Feb., 1957, at 9:30 o'clock a.m. on the said day, at the courthouse of the above-entitled Court at Seventh and Mission Streets in the City and County of San Francisco, State of California, Department thereof, move the Court as follows:

To dismiss the first cause of action contained in plaintiff's complaint on file herein because said complaint fails to state a claim against these moving defendants upon which relief can be granted.

Said motion will be based upon this notice of mo-

tion and all of the papers and records on file herein and the points and authorities attached hereto.

/s/ J. D. BURDICK,

Attorney for Defendants Homer Cunningham, Jess Gullett, Percy Landingham.

[Endorsed]: Filed January 14, 1957.

[Title of District Court and Cause.]

AFFIDAVIT OF J. D. BURDICK IN
SUPPORT OF MOTION TO DISMISS

State of California,

City and County of San Francisco—ss.

J. D. Burdick, being first duly sworn, deposes and says that:

* * *

Attached hereto, made a part hereof, and marked "Exhibit B" is a true, full and exact copy of the contract of insurance entered into between plaintiff, St. Paul Fire and Marine Insurance Company and the Ben Mast Lumber Company for the period January 27, 1951, to and including January 27, 1952, along with all of the endorsements attached to and made a part of that contract. This is the same contract referred to in paragraph VI of the first cause of action of plaintiff's complaint which

is, by paragraph I of the second cause of action, incorporated into the second cause of action.

* * *

/s/ J. D. BURDICK.

EXHIBIT B

10. Subrogation—In the event of any payment under this policy, the Company shall be subrogated to all the Insured's rights of recovery therefor against any person or organization and the Insured shall execute and deliver instruments and papers and do whatever else is necessary to secure such rights. The Insured shall do nothing after loss to prejudice such rights.

* * *

[Endorsed]: Filed January 14, 1957.

[Title of District Court and Cause.]

POINTS AND AUTHORITIES IN SUPPORT OF MOTIONS TO DISMISS, MOTION TO STRIKE, AND MOTION FOR MORE DEFINITE STATEMENT

A. Introduction

The complaint in this action contains two causes of action. The first cause of action is by the plaintiff

St. Paul Fire and Marine Insurance Company against three named individuals, who are Homer Cunningham, Jesse Gullett and Percy Laudingham. The general sense of that cause of action is that the named individuals were employed by the Ben Mast Lumber Company on or about the 9th day of March, 1951. That on or about that date these three individuals, while acting within the scope and course of their employment by the Ben Mast Lumber Company, so negligently and carelessly performed their duties as employees as to cause the death of one Wilbur C. Rasmussen. Wilbur C. Rasmussen was not employed by the Ben Mast Lumber Company. The action is apparently maintained by the plaintiff as the alleged subrogor of the Ben Mast Lumber Company.

The theory of the cause of action is that by reason of the negligence of these named individuals, the Ben Mast Lumber Company was sued by the widow of Rasmussen and was required to pay a \$75,000 judgment to her, and also incurred expenses by way of attorneys' fees and legal costs. As to this cause of action, the defendants seek a judgment upon the grounds that the action is barred by the applicable statute of limitations contained in the laws of the State of California.

* * *

[Endorsed]: Filed January 14, 1957.

[Title of District Court and Cause.]

AFFIDAVIT OF JAMES P. SHOVLIN, JR.,
IN OPPOSITION TO MOTION TO DIS-
MISS, ETC.

State of California,

City and County of San Francisco—ss.

James P. Shovlin, Jr., being first duly sworn, deposes and says:

That he is the attorney for the plaintiff herein and makes this affidavit on its behalf; that the suit of Rasmussen's heirs, resulting in the judgment against Mast Lumber Co., plaintiff's insured, was based solely upon the complaint that, not Mast, but the employees of Mast, acting within the scope of their employment, "carelessly used, caused to be used, maintained, and operated * * * log conveying equipment * * * that by reason of such carelessness, recklessness and negligence * * * a large log, being conveyed by said log conveying equipment, was caused to and did violently strike said * * * Rasmussen."

That said complaint did not, in any wise, other than under the doctrine of respondeat superior, charge Mast or the Mast Lumber Co. with any negligence.

That none of the employees of Mast were served with process in said action or appeared therein as

parties defendant and the judgment therein was solely against Mast Lumber Co.

That plaintiff herein, under its policy issued to Mast, paid said judgment, with interest and costs, totalling \$80,263.62 on August 17, 1956.

* * *

/s/ JAMES P. SHOVLIN, JR.

Subscribed and sworn to before me this 15th day of May, 1957.

[Seal] /s/ RUTH E. LYHACK,
Notary Public in and for the City and County of
San Francisco, State of California.

My Commission Expires May 31, 1960.

[Endorsed]: Filed May 16, 1957.

[Title of District Court and Cause.]

ORDER

Several motions are before this court. Plaintiff has moved to enter default judgments against the individual defendants in this action. Defendants have made the following motions: To dismiss the action against the individual defendants on the ground that the claim against these defendants is barred by the applicable statute of limitations; to dismiss the action against defendant Fidelity &

Casualty Company of New York on several alternative grounds; to strike certain allegations from the complaint; and a motion for a more definite statement.

The motion to dismiss the action as to the individual defendants is on the ground that the applicable statute of limitations is the one-year period for tort actions provided in Section 340(3) of the California Code of Civil Procedure. Considering the purpose of statutes of limitations, I hold that Section 340(3) is applicable here. See *Aetna Casualty & Insurance Company v. Pacific Gas & Electric Company, et al.*, 41 Cal. 2d 785 (1953). Accordingly, the motion to dismiss the action as to the individual defendants is granted.

* * *

Dated: June 24th, 1957.

/s/ EDWARD P. MURPHY,
United States District Judge.

[Endorsed]: Filed June 24, 1957.

In the United States District Court for the Northern District of California, Southern Division

No. 35,780

ST. PAUL FIRE AND MARINE INSURANCE
COMPANY,

Plaintiff,

vs.

HOMER CUNNINGHAM, et al.,

Defendants.

JUDGMENT AND ORDER
OF DISMISSAL

The motion of defendants Homer Cunningham, Jess Gullett and Percy Landingham came on regularly for hearing on the 16th day of May, 1957, plaintiff above named appearing by James P. Shovlin, Jr., its attorney, and defendants, Homer Cunningham, Jess Gullett and Percy Landingham, appearing by Carroll, Davis & Burdick, by J. D. Burdick, their attorneys, and evidence by affidavit having been received by the Court, the Court having been fully advised in the premises and having thereupon ordered submission of the said motion, and thereafter on the 24th day of June, 1957, the Court having made and entered its written order granting the motion of defendants Cunningham, Gullett and Landingham for dismissal,

The Court, finding and expressly determining that there is no just reason for delaying the entry of

final judgment of dismissal as to defendants Cunningham, Gullett and Landingham, hereby directs the Clerk of the above-entitled Court to enter judgment of dismissal in favor of defendants Cunningham, Gullett and Landingham.

Dated July 1st, 1957.

/s/ EDWARD P. MURPHY,
United States District Judge.

It Is Hereby Ordered, Adjudged and Decreed that the above-entitled action be and the same is hereby dismissed as to defendants Cunningham, Gullett and Landingham.

/s/ C. W. CALBREATH,
Clerk;

By /s/ MARGARET P. BLAIR,
Deputy.

[Endorsed]: Filed July 1, 1957.

[Title of District Court and Cause.]

NOTICE OF APPEAL TO UNITED STATES
COURT OF APPEALS FOR THE NINTH
CIRCUIT

Notice Is Hereby Given that St. Paul Fire and Marine Insurance Company, plaintiff above named, hereby appeals to the United States Court of Ap-

peals for the Ninth Circuit from the Judgment and Order of Dismissal entered in this action on July 1, 1957, as to defendants Homer Cunningham, Jess Gullett and Percy Landingham.

/s/ JAMES P. SHOVLIN, JR.,
Attorney for Said Appellant.

[Endorsed]: Filed July 30, 1957.

[Title of District Court and Cause.]

STATEMENT OF POINTS ON WHICH APPELLANT INTENDS TO RELY ON THE APPEAL

Appellant states the following points upon which it intends to rely on the appeal herein:

I.

The order and judgment of dismissal as to the first cause of action against the individual defendants, respondents herein, is without foundation or basis in law or fact and is contrary to law.

(a) The order directing judgment of dismissal is based upon the erroneous view of the trial court, not sustainable by the pleadings, that said cause of action is one for damages for the negligent tort of said defendants and respondents, as obviously such action is not assignable and as said defendants admit in their points and authorities in support of

their motion, the cause of action is brought by plaintiff and appellant against said defendants and respondents under its right of subrogation as insurer of the employer of said defendants, said employer having been forced by judgment to pay, on August 17, 1956, the judgment against it, said judgment being rendered against said employer alone solely because of the alleged negligence of its said employees, the defendants and respondents herein, proximately causing the death of said Rasmussen, whose heirs recovered such judgment against said employer as the sole defendant in said wrongful death action only upon the theory of its liability under the doctrine of respondeat superior.

(b) That plaintiff under law as well as the terms of plaintiff's policy issued to said employer was subrogated to all the rights of said employer against said employee defendants for indemnity against loss of plaintiff's said insured, the employer of the defendants and respondents herein.

(c) That the trial court erroneously applied the one-year statute of limitations, Section 340(3), Code of Civil Procedure, to said cause of action, while the right of indemnity sought to be enforced by plaintiff as such subrogee of their employer for said employer's right of indemnity against loss, against the said employees, defendants and respondents herein, is governed by Section 339(1) of the California Code of Civil Procedure, which said cause of action did not accrue until plaintiff's sub-

rogor, said employer of said defendants, had paid the loss.

/s/ JAMES P. SHOVLIN, JR.,
Attorney for Plaintiff and
Appellant.

Certificate of Service by Mail attached.

[Endorsed]: Filed August 21, 1957.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO
RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, hereby certify the foregoing and accompanying documents, listed below, are the originals filed in this Court in the above-entitled case and constitute the record on appeal herein, as designated by the Attorney for the Appellant:

Excerpt From Docket Entries.

Complaint.

Motion of Plaintiff for Production and Inspection of Records.

Motion of Defendants Homer Cunningham, Jess Gullett and Percy Laundingham to Dismiss.

Affidavit of J. D. Burdick in Support of Motion to Dismiss, etc.

Memo. of Defendants in Support of Motions to Dismiss, etc.

Affidavit of James P. Shovlin, Jr., in Opposition to Motion to Dismiss, etc.

Order of Court.

Judgment and Order of Dismissal.

Notice of Appeal.

Bond on Appeal.

Statement of Points Upon Which Appellant Intends to Rely on Appeal.

Appellant's Designation of Record on Appeal.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court this 27th day of August, 1957.

[Seal]

C. W. CALBREATH,
Clerk;

By /s/ MARGARET P. BLAIR,
Deputy Clerk.

[Endorsed]: No. 15695. United States Court of Appeals for the Ninth Circuit. St. Paul Fire and Marine Insurance Company, a Corporation, Appellant, vs. Homer Cunningham, Jess Gullett and Percy Laudingham, Appellees. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed August 27, 1957.

Docketed September 4, 1957.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

No. 15,695

United States Court of Appeals
For the Ninth Circuit

ST. PAUL FIRE AND MARINE INSURANCE
COMPANY, a Corporation,

Appellant,

VS.

HOMER CUNNINGHAM, JESS GULLETT
and PERCY LAUDINGHAM,

Appellees.

Appeal from the United States District Court for the
Northern District of California,
Southern Division.

APPELLANT'S OPENING BRIEF.

JAMES P. SHOVLIN, JR.,
244 Kearny Street,
San Francisco 8, California,
Attorney for Appellant.

FILED

FEB - 4 1958

PAUL P. O'BRIEN, CLERK

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No. 15,695

**United States Court of Appeals
For the Ninth Circuit**

ST. PAUL FIRE AND MARINE INSURANCE
COMPANY, a Corporation,

Appellant,

VS.

HOMER CUNNINGHAM, JESS GULLETT
and PERCY LAUDINGHAM,

Appellees.

Appeal from the United States District Court for the
Northern District of California,
Southern Division.

APPELLANT'S OPENING BRIEF.

I.

STATEMENT OF THE PLEADINGS AND FACTS DISCLOS-
ING BASIS UPON WHICH IT IS CONTENDED THAT
THE DISTRICT COURT HAD JURISDICTION AND THAT
THIS HONORABLE COURT HAS JURISDICTION TO RE-
VIEW THE ORDER AND JUDGMENT OF DISMISSAL OF
THE FIRST CAUSE OF ACTION AGAINST DEFEND-
ANTS AND APPELLEES HOMER CUNNINGHAM, JESS
GULLETT AND PERCY LANDINGHAM.

The complaint in the first cause of action against
appellees alleged that plaintiff and appellant is a
corporation organized and existing under the laws
of the State of Minnesota and is a resident of said

state; that the defendant Fidelity & Casualty Company of New York is a corporation organized and existing under the laws of the State of New York and is a resident of said state; that the individual defendants and appellees are residents of the State of California (Pars. I and III of the Complaint, Tr. pp. 3-4); that plaintiff and appellant insured Ben Mast Lumber Company for liability imposed upon said insured by law for personal injuries and death caused by the negligence of said insured's employees; and that upon the trial of the said Rasmussen action against said insured employer, as the result of the negligence of its employees acting within the course and scope of their employment by said insured, a judgment was entered on June 29, 1955, in favor of the heirs of one Wilbur C. Rasmussen as the result of the negligence of the employees of appellant's said insured for the sum of \$75,000 and costs (Pars. V to VII, Tr. pp. 4-6); that it is uncontradicted that said Rasmussen suit resulting in said judgment against appellant's said insured was based solely upon the complaint that, not said insured, but the employees of said insured carelessly used, caused to be used, maintained and operated log conveying equipment, and that by reason of such carelessness a large log, being conveyed by said log conveying equipment, was caused to and did violently strike said Rasmussen; that said complaint in the Rasmussen action did not in any wise, other than under the doctrine of *respondeat superior*, charge appellant's insured, Mast Lumber Company, with any negligence;

that none of the employees of Mast was served with process in said Rasmussen action or appeared therein, and the judgment was rendered solely against said Mast Lumber Company; that said appellant, under the terms of its policy issued to said Mast Lumber Company, paid said judgment with interest, costs and expenses totalling \$80,263.62 on August 17, 1956 (Tr. pp. 12-13); that the complaint herein was filed in the District Court on August 23, 1956, by appellant, as subrogee of Mast, to recoup said loss.

That, as appears from the foregoing, the District Court had original jurisdiction of this action for indemnity or restitution brought by plaintiff and appellant as subrogee of its said insured, Mast Lumber Company, not only under the general law but also pursuant to Condition 10 of appellant's policy issued to said Mast Lumber Company covering subrogation (Tr. p. 10), appellant having made the payment on behalf of Mast under its policy.

As heretofore indicated by the pleadings, as provided in Sections 1331 and 1332 of Title 28, United States Code Annotated, the District Court had original jurisdiction of this action as it appears the matter in controversy exceeds the sum of \$3000 and the action is between citizens of different states.

The order and judgment of dismissal of appellant's first cause of action against the individual employees is a final decision of the District Court of the United States as to the first cause of action of appellant against appellees, the individual employees (Tr. pp.

15-16). Under the provisions of Section 1291 of Title 28, U.S.C. Ann., this Court is given jurisdiction of appeals from all final decisions of the District Courts of the United States.

II.

CONCISE STATEMENT OF THE CASE.

The facts as to the pleading of Appellant in the preceding division hereof, in the interests of conciseness will not be repeated, as the order and judgment of the District Court sought to be reviewed is one of dismissal of appellant's first cause of action, given on appellees' motion to dismiss "because said complaint fails to state a claim against these moving defendants upon which relief can be granted" (Tr. p. 8). In support of said motion, appellees' attorney filed points and authorities declaring that "the action is apparently maintained by the plaintiff, as the alleged subrogor (sic) of the Ben Mast Lumber Company", and that as to this cause of action defendants seek a judgment upon the grounds that the action is barred "by the applicable statute of limitations contained in the laws of the State of California" (Tr. 11).

Appellant's attorney also filed an affidavit in opposition to the motion to dismiss (Tr. 12-13) averring that the Rasmussen heirs' suit, upon which their judgment was obtained against Mast Lumber Co. alone, was upon a complaint that, not Mast, but the

employees of Mast, acting within the scope of their employment, negligently caused the injury to and resulting death of Rasmussen and that said complaint in said action did not, in any wise, other than under the doctrine of *respondeat superior*, charge Mast or Mast Lumber Co. with any negligence; that none of the employees of Mast was served with process in said suit or appeared therein as parties defendant.

After hearing and argument, the trial judge held that the one year statute of limitations was applicable and granted appellees' motion to dismiss as to appellees.

Appellant thereupon duly and timely brought this appeal from the judgment and order of dismissal (Tr. pp. 16-20).

The questions involved are whether appellant's complaint against appellees is an action "for injury to or death of one caused by the wrongful act or neglect of another" or upon a contract, obligation or liability not founded upon an instrument of writing, and when did the cause of action of plaintiff's insured accrue.

III.

SPECIFICATION OF ERRORS.

1. The trial Court erred in holding that Section 340(3) of California Code of Civil Procedure is applicable to appellant's cause of action against the appellees, instead of Section 339(1) of that code.

2. The trial Court erred in obviously holding that appellant's cause of action was one "for injury to or for the death of one caused by the wrongful act or neglect of another", a necessary prerequisite to the application of said Section 340(3), instead of one "upon a contract, obligation or liability not founded upon an instrument of writing" (Sec. 339(1)).

3. The trial Court erred in obviously holding that the cause of action of appellant's insured and subrogor accrued at the time of the injury and death of Rasmussen, rather than after a *loss* was paid by Mast Lumber Co. or on its behalf by appellant as its insurer.

Note. As these errors specified are each so interwoven in relation to the trial judge's holding that the appellant's cause of action against appellees was barred by the statute of limitations, counsel in his argument has been impelled to consider and discuss each of them throughout.

ARGUMENT.

In the proceeding culminating in the order and judgment of dismissal appealed from, there is absolutely no conflict in the *facts* presented to the trial Court in the complaint (Tr. pp. 3-6), the motion, affidavit and supporting points and authorities of appellees (Tr. pp. 8-11) or the opposing affidavit of appellant's attorney (Tr. pp. 12-13).

It appears, uncontradicted and unchallenged, that the Rasmussen accident occurred March 9, 1951; the

heirs brought suit against Mast Lumber Co. and its employees for injury to and death of their decedent on March 8, 1952, based upon the alleged negligence of Mast's employees, no charge of liability or negligence was made against Mast other than under the *respondeat superior* doctrine; none of the employees of Mast (appellees herein), who, in the instant action, were alleged (Comp. Par. V, Tr. p. 4) to have so negligently used and loaded the Green truck while acting in the course of their employment by Mast, that as a proximate result of their negligence Rasmussen was killed, was served or appeared as parties in said suit, and the judgment therein was rendered solely against Mast Lumber Co., which judgment was paid, with interest and costs, a total of \$80,263.62, on August 17, 1956, and the present suit commenced by plaintiff on August 23, 1956, as subrogee under its policy covering Mast, but not its employees (Tr. p. 10) (Record "Exh. B", p. 12).

A.

OBVIOUSLY APPELLANT'S ACTION AGAINST APPELLEES CANNOT BE CONSTRUED TO BE FOR DAMAGES FOR NEGLIGENT INJURY OR DEATH OF RASMUSSEN AND THEREFORE THE PROVISIONS OF SEC. 340(3) CANNOT BE INVOKED UNDER AS A LIMITATION OF ACTION AGAINST APPELLANT.

Neither Ben Mast Lumber Co. nor appellant is within the statutory designation of those named by Section 377 of the California Code of Civil Procedure as authorized to maintain such action for wrongful death. However, this Court and the Supreme Court

of the State of California have long recognized the cause of action of an innocent employer who, solely under the doctrine of *respondeat superior*, has sustained a loss paid by reason of the negligence of an employee against such employee, to recover such loss under an *implied* contract of *indemnity*.

To emphasize the importance of this contention, especially in view of the total absence of any conflict in the *facts* involved, the liberty is taken to quote from the pertinent parts of both pertinent sections of the California Code of Civil Procedure on limitations of action:

Section 340 (limiting to one year) "3. An action . . . for injury to or death of one caused by the wrongful act or neglect of another. . . ."

Section 339 (limiting to two years) "An action upon a contract, obligation or liability not founded upon an instrument of writing. . . ."

It is apparent therefore that appellant's cause of action, as subrogee of its insured, is based solely upon the implied right of an innocent employer to recoup its loss, caused by the unauthorized negligent act of its employees, from such employees, as will be further expounded in the following division of this argument.

B.

A PERSON, WHO, WITHOUT PERSONAL FAULT, HAS BECOME SUBJECT TO TORT LIABILITY FOR THE UNAUTHORIZED AND WRONGFUL CONDUCT OF ANOTHER, IS ENTITLED TO INDEMNITY FROM THE OTHER FOR EXPENDITURES PROPERLY MADE IN THE DISCHARGE OF SUCH LIABILITY.

This principle, set out in Sec. 96, Restatement of the Law of Restitution has been followed and adopted by this Court and the Supreme Court of the State of California, even extending the same right and cause of action to the insurer of such innocent person, who has been held subject to tort liability, against the wrongdoer for expenditures properly *made* in discharge of its insured's liability.

Canadian Indemnity v. U.S. F. & G. Co., 213 Fed. 2d 658 in which the decision of Judge Edward P. Murphy of United States District Court, Northern District, Southern Division, California, was affirmed by this Court, approved the principle for which appellant is contending. This Court in that decision held that a driver's employer, who had not been at fault, could recoup from the driver for the *loss* sustained by said employer as a result of its liability for damages from the negligent operation of the motor vehicle, and that the employer's insurer, as subrogee, had a cause of action against such negligent employee to recoup such loss. This Court's opinion, referred to the earlier case of *United Pacific Ins. Co. v. Ohio Cas. Ins. Co.*, 72 Fed. 2d 836, 840, announcing the same principle and in footnote 5, states:

“An employer against whom a judgment has been rendered for damages occasioned by the un-

authorized negligent act of an employee *may recoup his loss* in an action against the negligent employee.” (Citing *Johnston v. City of San Fernando*, 35 Cal. App. 2d 244, 246, 95 P. 2d 147, and *Myers v. Tranquility Irr. Dist.*, 26 Cal. App. 2d 385, 387, 79 P. 2d 419.)

In the last cited *Myers* case, the California appellate Court stated:

“It is the law in California that an employer against whom a judgment has been rendered for damages occasioned by the unauthorized act of negligence of his employee **MAY RECOUP** his loss in an action against the negligent servant” citing *Bradley v. Rosenthal*, 154 Cal. 420, *infra*.

In this Court’s decision in the *Canadian Indemnity* case, *supra*, in Syllabus 1 of its opinion, it definitely holds that the agent or servant of an employer, the latter being without fault, has a duty to *reimburse* his employer and that the employer, under such circumstances, may *recoup his loss* from its employee (citing *Bradley v. Rosenthal*, 154 Cal. 420; *Popejoy v. Hannon*, 37 Cal. 2d 159; and *Spruce v. Wellman*, 98 C.A. 2d 158). It further held that the insurer for such innocent employer, who had no liability except under the theory of *respondeat superior* for his employee’s negligence, had the right, under subrogation to *recoup the loss* paid by such insurer in the premises.

The principle for which we contend—that an innocent employer has a cause of action for indemnity or restitution against his negligent employees which has

resulted in a judgment against the employer—after such employer has paid the judgment and thereby sustained a *loss*, is first indicated by the California Supreme Court in the case of *Bradley v. Rosenthal*, 154 Cal. 420, 424, 97 P. 875, in which that Court said:

“Upon the general question here presented as to the correlative rights of master and servant, principal and agent, to indemnity, Cooley thus clearly enunciates the well-settled principle (1 Cooley on Torts, 3d ed. p. 255): ‘A case in point is where a railroad company is made to pay damages for an injury caused by the carelessness of one of its servants. Here the injured party may justly hold both the company and its servants to responsibility; but the actual wrong, so far as it is one in morals, is on the part of the servant alone, and the company is holden only through its obligation to be accountable for the action of those to whom it intrusts its business. As between the company and its servants, the latter alone is the wrongdoer, and in calling upon him for indemnity, the company bases no claim upon its own misfeasance or default, but upon that of the servant himself.’”

The California Supreme Court in *Continental Casualty v. Phoenix Constr. Co.*, 46 Cal. 2d 423, 296 P. 2d 801, announces the pertinent principle herein involved, as follows:

“(1) Where a judgment has been rendered against an employer for damages occasioned by the unauthorized negligence of his employe, the employer may recoup his loss in an action against the negligent employe” (p. 428) (citing, among others, Rest. Restitution, 418-419, Sec. 96; 35 Am.

Jur. 530-531, Sec. 101; 56 C.J.S. 502, Sec. 79;) * * * "that is, as between employer and employee is such a situation, the obligation of the employee is primary and that of the employer secondary" (p. 429).

The California Supreme Court further in this case enunciates the principle (p. 429, Syll. 2):

"Under equitable principles of subrogation, the insurer of the employer who has been compelled to pay the judgment against the employer may recover against the negligent employee or the employee's insurer. (*Canadian Indemn. Co. v. United States F. & G. Co.* (1954, 9 Cir.), 213 F. 2d 658, 659; see also *Maryland Cas. Co. v. Employers Mut. Liab. Ins. Co.* (1953), 208 F. 2d 731; *United Pacific Ins. Co. v. Ohio Cas. Ins. Co.* (1949, 9 Cir.), 172 F.2d 836, 840 (note 5), 846-848.)"

The California Supreme Court thus recognized and followed the decisions of this Court extending to the employer's insurer, under the equitable principles of subrogation, as well as the express agreement in appellant's policy (Condition 10, Tr. p. 10), the right to recover from its insured's negligent employees, the loss sustained and paid by it by reason of the judgment against its insured employer.

It may be well to point out that, according to Exhibits A and B, respectively, the policy of Fidelity issued to its insured Green and that of appellant issued to Mast Lumber Co. attached to and made a part of the affidavit of their counsel in support of their motion to dismiss, the Green policy covered the lia-

bility of Mast as well as his negligent employees while the Mast Lumber Co. public liability policy did not extend coverage to its employees. Furthermore, the Green policy, being a motor vehicle liability policy, irrespective of its terms, includes therein the provisions of section 415 of the California Vehicle Code, which requires that every motor vehicle liability policy shall meet the following requirements:

“ . . . (2) Such policy shall insure the person named therein and any other person using or responsible for the use of said motor vehicle or motor vehicles with the express or implied permission of said assured.”

In the recent case of *Wildman v. Govt. Employees' Ins. Co.*, 48 Cal. 2d 31, 39-40, 307 P. 2d 359, the California Supreme Court held that said Section 415, Vehicle Code must be considered a part of every motor vehicle liability policy.

It must be acknowledged that this principle emphasizing the right of an innocent employer to *recoup his loss* against a negligent employee because of a liability imposed upon the employer, implies that, before the employer's right of action can *accrue* he must have *paid* the judgment against him otherwise he would not have incurred a *loss*, and he would have no accrued cause of action against the negligent employee. Certainly a cause of action for indemnity against *loss* cannot accrue until the loss is incurred and *paid*.

Sec. 2778, California Civil Code, provides (in its pertinent parts) as follows:

“In the interpretation of a contract of indemnity, the following rules are to be applied, unless a contrary intention appears: . . .

2. Upon an indemnity against claims, or demands, or damages, or costs, expressly or in other equivalent terms, the person indemnified is not entitled to recover without payment thereof.”

Thus, by statutory law of California, appellant would have not an *accrued* action against appellees until it had paid the sum for which it claims indemnity against claims, demands, damages or costs. This is in consonance with the general view of the decisions. Otherwise, as in the case at bar, appellant or its insured, without payment of the Rasmussen judgment, could have recovered from appellees and their insurer without having actually sustained a *loss* but merely a liability.

In its order granting appellees' motion to dismiss the action against appellees, the trial Court based its conclusion that the one year statute of limitations (Sec. 340 (3), Cal. Code of Civil Procedure) is applicable to appellant's cause of action, on the case of *Aetna Cas. & Ins. Co. v. P. G. & E. Co.*, 41 Cal. 2d 785 (Tr. p. 14).

This case is obviously quite foreign to the question here involved. There it was only considered and determined by a four to three decision that an employer, as statutory subrogee of the employee's cause of action for damages against a third party *for injuries to the employee*, is limited by the one year statute.

In the case at bar, we emphasize that the employer's right of action against the employee, for damages as the result of liability imposed upon the innocent employer by reason solely of the doctrine of *respondeat superior*, is not an action in tort but one for indemnity or restitution, implied by law, which does not *accrue* until the loss, if any, has been sustained and *paid* by the non-negligent employer.

In this *Aetna* case the provisions of the California Labor Code, Sections 3852 and 3854, were primarily involved.

Section 3852 provides:

“The claim of an employee for compensation does not affect his claim or right of action for all damages proximately resulting from such injury or death against any person other than the employer. Any employer who pays, or becomes obligated to pay compensation, or who pays, or becomes obligated to pay salary in lieu of compensation, may likewise make a claim or bring an action against such third person. In the latter event, the employer may recover in the same suit, in addition to the total amount of compensation, damages for which he was liable including all salary, wage, pension, or other emolument paid to the employee or to his dependents.”

Section 3854 of the California Labor Code provides that in an action prosecuted by the employer alone

“* * * After recouping himself for such special damages, together with a reasonable attorney's fee fixed by the court, *which shall be based solely upon the services rendered by the employer's*

attorney in effecting recovery for the benefit of the employee, the employer shall pay any excess to the injured employee or other person entitled thereto." (Emphasis added.)

It is thus support for the majority decision in that case that, unlike the case at bar, the employer was there prosecuting the *same* cause of action for damages for injury to the employee as that which the employee had. Such cause of action would be governed by the one year statute of limitations, Section 340(3) C.C.P., covering an action "for injury to or for the death of one caused by the wrongful act or neglect of another."

In the case at bar, however, we respectfully urge that Section 339(1) of said Code, providing for a two year limitation of action, governs the case at bar as "an action upon a contract, obligation or liability not founded upon an instrument of writing," and that such cause of action, being one for indemnity or restitution, brought by an innocent employer against his negligent employees, does not *accrue* until the employer (or his insurance carrier on his behalf) *pays* the loss on August 17, 1956, which is six days prior to the commencement of this action in the District Court (Tr. pp. 6, 8, 13).

CONCLUSION.

From the undisputed facts in the record herein and under the law and decisions cited herein, the trial Court erred in apparently determining that appellant's cause of action against appellees was an action in tort for damages for the injury to and death of Rasmussen. However, the cited authorities recognize the established right of an innocent employer, who was held liable for the unauthorized negligence of his employees, to sue the negligent employees upon their implied obligation, contract or liability to indemnify him for his loss. Such right of recoupment, indemnity or restitution cannot accrue until the employer sustains the *loss*. Such right is founded upon equitable and legal principles, well established, that one whose negligent conduct, unauthorized by his employer, which results in a loss imposed upon such innocent employer, is liable in law and equity to indemnify and repay to such employer the *loss* which he sustained and paid by reason of such negligence. Further, under the cited decisions, upon payment by the employer's insurer of such loss, the latter is subrogated to all the rights of the employer to *recoup such loss*.

Appellant's cause of action, as such subrogee, was based upon an implied, unwritten, contract, obligation or liability of appellees which did not accrue until six days before the suit herein was filed, when the judgment against its insured was paid, and the controlling statute of limitations of such action for indemnity, restitution or recoupment is obviously Section 339(1) of the California Code of Civil Procedure

providing that an action upon such implied contract be brought within two years after the cause of action accrued.

It is therefore respectfully prayed that the order and judgment of dismissal be reversed.

Dated, San Francisco, California,
January 27, 1958.

Respectfully submitted,
JAMES P. SHOVLIN, JR.,
Attorney for Appellant.

(Appendix Follows.)

Appendix

Exhibits part of the Record.

Record on Appeal

- Exhibit A (policy of Fidelity and Casualty Company of New York issued to George W. Green, attached to and incorporated in affidavit of appellees' counsel in support of motion to dismiss) p. 6
- Exhibit B (policy of appellant issued to Ben Mast Lumber Co., attached to and incorporated in said affidavit of appellees' counsel above designated, Condition 10 of which is set out in printed Transcript, p. 10) p. 12



No. 15,695

United States Court of Appeals
For the Ninth Circuit

ST. PAUL FIRE AND MARINE INSURANCE
COMPANY, a Corporation,

Appellant,

vs.

HOMER CUNNINGHAM, JESS GULLETT
and PERCY LAUDINGHAM,

Appellees.

Appeal from the United States District Court for the
Northern District of California,
Southern Division.

BRIEF FOR APPELLEES.

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FILED

MAR 25 1958

PAUL P. O'BRIEN, CLERK



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Appeal from the United States District Court for the
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BRIEF FOR APPELLEES.

I.

STATEMENT OF THE CASE.

This appeal is from the order and judgment of the District Court whereby the said court dismissed the action as to the appellees.

The action was dismissed upon the District Court's finding that the applicable statute of limitations had run before appellant commenced this action (T.R. p. 14).

Appellant insurance company's complaint, which was filed in the District Court on August 23, 1956, re-

cited the following facts: That on March 9, 1951, appellees were employed by the Ben Mast Lumber Co.; that on said date appellees, while acting within the course and scope of their said employment, negligently and carelessly used and loaded a truck whereby one Rasmussen was killed; that on said date appellant insurance company insured Ben Mast Lumber Co. for such liability; that on March 8, 1952, the heirs of Rasmussen filed suit against Ben Mast Lumber Co. and its employees; that on June 29, 1955, judgment was entered in favor of the heirs of Rasmussen and against the Ben Mast Lumber Co. in the sum of \$75,000, with costs, which said judgment was paid by appellant on behalf of Ben Mast Lumber Co. on August 17, 1956 (T.R. pp. 3-6).

Although appellant's complaint does not so state, appellant apparently seeks to maintain the action as the subrogee of Ben Mast Lumber Co., asserting Ben Mast's alleged cause of action against its own employees for damages allegedly suffered by Ben Mast because of appellees' alleged negligence occurring March 9, 1951.

II.

THE ISSUES.

The issues to be determined upon this appeal are:

1. What statute of limitations properly applies to the alleged cause of action of appellant against appellees.

2. When does such period of limitations commence running?
-

III.

ARGUMENT.

It is apparently agreed that the law applicable to this cause is the law of the State of California (Appellant's Opening Brief, pp. 9-16).

Appellant's apparent contention is that the cause of action asserted by it is one for breach of an implied contract of indemnity; that such a cause of action is controlled by Section 339 of the California Code of Civil Procedure, and that the two-year period of limitations did not commence to run until it had paid the judgment on August 17, 1956. The Code sections in question provide as follows:

Section 340. Within one year: * * *

3. An action for libel, slander, assault, battery, false imprisonment, seduction of a person below the age of legal consent, or for injury to or for the death of one caused by the wrongful act or neglect of another, or by a depositor against a bank for the payment of a forged or raised check, or a check that bears a forged or unauthorized endorsement, or against any person who boards or feeds an animal or fowl or who engages in the practice of veterinary medicine as defined in Business and Professions Code Section 4826, for such person's neglect resulting in injury or death to an animal or fowl in the course of boarding or feeding such animal or fowl or in the course of the

practice of veterinary medicine on such animal or fowl.

Section 339. Within two years:

1. An action upon a contract, obligation or liability not founded upon an instrument of writing, other than that mentioned in subdivision two of section three hundred thirty-seven of this code; or an action founded upon a contract, obligation or liability, evidenced by a certificate, or abstract or guaranty of title of real property, or by a policy of title insurance; provided, that the cause of action upon a contract, obligation or liability evidenced by a certificate, or abstract or guaranty of title of real property or policy of title insurance shall not be deemed to have accrued until the discovery of the loss or damage suffered by the aggrieved party thereunder.

2. An action against a sheriff, coroner, or constable upon a liability incurred by the doing of an act in his official capacity and in virtue of his office, or by the omission of an official duty including the nonpayment of money collected upon an execution. But this subdivision does not apply to an action for an escape.

It is the position of appellees that the applicable statute of limitations is the one year statute provided by Section 340 (3) of the California Code of Civil Procedure as found by the District Court.

(a) Whether Appellant's Alleged Cause of Action Is Based Upon Contract or Tort Is Not Determinative of the Proper Period of Limitations.

Appellant has devoted practically its entire brief to a discussion of two propositions, which are:

(1) that the master (Ben Mast Lumber Co.) does under proper circumstances have a cause of action against its employee-servants (appellees herein) arising out of the latter's alleged negligence whereby the master was damaged; and (2) that the cause of action is one in contract for the breach of an implied contract of indemnity existing between the master and its servants. Neither of these propositions is determinative of the issues herein and appellant has not cited a single authority from the State of California (or otherwise) in support of its contention that the statute of limitations applicable to its alleged cause of action against appellees is the two-year statute provided by California Code of Civil Procedure Section 339.

It is now, and has for many years been well settled by the law of the State of California that where misconduct or negligence constitutes a cause of action (or is the substantial "gravamen" of the cause of action) the selection of the applicable statute of limitations is entirely dependent upon the precise language of the various statutes of limitations provided by the California Code of Civil Procedure (Sections 335-349-3/4). And whether the misconduct or negligence complained of constitutes a breach of contract or of some positive duty (tort duties) is totally immaterial.

For example, it is well settled in the State of California that the cause of action for breach of warranty is controlled by *either* the one- (§ 340) or two- (§ 339) year period of limitations *depending* upon whether the misconduct or negligence results in personal injuries or death to another or some other type of injury or damage not involving personal injuries.

In the case of *Rubino v. Utah Canning Co.*, 123 C. A. 2d 18, 266 P. 2d 163, (1954) plaintiffs sued for personal injuries resulting from the eating of unwholesome canned peas manufactured and sold by defendants. The action was admittedly based upon an implied warranty of fitness which the court declared to be a contract, saying, at page 21:

“An implied warranty, one imposed by law, is obviously ‘ . . . a contract, obligation or liability not founded upon an instrument of writing . . . ’ Were we to go no further it would seem apparent then that subdivision 1, section 339, Code of Civil Procedure, would govern and that any action predicated upon a *liability* for violation of an implied warranty must be brought within the two year limitation.”

The court went on to hold, after a lengthy discussion, that the one year statute applied, saying, at page 26:

“It seems apparent that the legislative intent behind subdivision 3, Section 340, Code of Civil Procedure, was not to restrict its coverage to tort actions independent of any contractual relation, but to provide a limitation of one year where personal injury or death results, regardless of the

tort, contract, or breach of express or implied warranty aspect of the case.”

That the two-year statute may also apply to a cause of action based on negligence or misconduct where the duty is created by contract but the negligence does not result in personal injuries is made clear by the case of *Lattin v. Gillette*, 95 Cal. 317, 30 P. 545 (1892). In this case the Supreme Court of California held that the liability of an abstractor of titles to one damaged by negligence of the abstractor in reporting the title clear of defects, although based on negligence, was nevertheless controlled by the two year statute under Section 339, Code of Civil Procedure. (See also *Wood v. Currey*, 57 Cal. 208 (1881)). From the foregoing it is clear that whether or not appellants’ alleged cause of action is thought to be based on contract or tort can not be determinative of the proper statutory period of limitations to be applied thereto. That issue must be resolved by the language of the various statutes of limitation in question and the case law relating thereto.

(b) The District Court Properly Applied the One Year Statute Provided for by California Code of Civil Procedure 340 (3).

Although appellant’s position is not entirely clear, it apparently contends that the one year statute of limitations applies only where the “injury” or “death” involved is the “injury” of the plaintiff, or a death for which plaintiff might maintain a wrongful death action under Section 337 of the California Code of Civil Procedure. (See Appellant’s Opening Brief,

p. 7, last paragraph.) In other words appellant apparently contends that Section 340 (3) does not and can not apply where the injury or death is that of some person other than the plaintiff, and plaintiff's damage, by way of paying damages himself to the injured party or heirs of the decedent, arises solely by reason of plaintiff's *relationship* to the injured or deceased person. The case law of the State of California makes clear that whether plaintiff is himself the person "injured", or an heir of the decedent, or sustains damage only by reason of his *relation* to the injured party or decedent, does not alter the case and in each instance the cause is one controlled by the one year statute of limitations under Code of Civil Procedure § 340 (3). A number of different legal situations, all conclusively demonstrating the same point, can be considered.¹

Perhaps the clearest and most directly analogous case is where an employer who has been required to pay workmen's compensation to his injured employee seeks to recover his damages thus sustained from the third party tort-feasor whose negligence proximately caused the injury or death of the employee. In such type case all of the substantial factual features bearing upon the employer's cause of action are identical to those existing in this case. In the supposed case the employer is himself free from negligence (which

¹It should be noted that considerable research has failed to reveal any case before the California courts wherein the contention was made, as it is here made by appellant, that the two year statute (Code of Civil Procedure 339) would apply to the master's action against his servant.

is appellant's claim here), the employer is not himself personally injured or killed (which is the case here), and finally is damaged only by reason of being required to pay damages to the employee because of his *relational status* with regard to such employee, namely, the status of employer and employee. The case of *Aetna Casualty and Surety Company v. Pacific Gas and Electric Company*, 41 C. 2d 785, 264 P. 2d 5 (1953) involved that precise situation. In that case the Supreme Court of the State of California affirmed the trial court's order dismissing the action made on the grounds that the one-year statute of limitations applied and not the three-year statute applying to actions "upon a liability created by statute" (California Code of Civil Procedure § 381, subd. 1). Again, the court was constrained to point out that whether the *liability* was one in tort or one arising under a statute was not determinative of the applicable statutory period, saying at page 787:

"Assuming without deciding, that this liability of the tortfeasor to the employer or its insurance carrier for the employee's general damages is one created by statute (cf. *Limited Mutual Comp. Ins. Co. v. Billings*, 74 Cal. App. 2d 881, 884-885 [169 P. 2d 673], nevertheless under settled legal principles the trial court correctly concluded that the one-year statute applied."

The court went on to point out that whether the action was brought by the party who himself suffered personal injuries or by a party who, although himself innocent of negligence, was *damaged* by reason of hav-

ing to pay damages to the injured party because of their relational interest (viz., employer-employee), nevertheless the action was one squarely within the language of Section 340 (3), and therefore barred unless commenced within one year of the accident. In this regard the court said, at page 787, as follows:

“The employee’s general damage claim whether prosecuted by the employee personally or by his employer or its insurance carrier on his behalf, is solely one in tort for personal injuries arising out of the negligence of the third party tortfeasor; hence the cause of action accrues at the time of the negligent act. No matter who may be the party plaintiff, the cause of action is one within the express terms of subdivision 3 of section 340 of the Code of Civil Procedure.”

The case of *Basler v. Sacramento Ry. Co.*, 166 C. 33, 134 P. 993 (1913) illustrates a further situation wherein the court has found that whether the negligently caused personal injuries are directly suffered by the plaintiff or whether the plaintiff suffers damage only because of his relative rights does not affect the applicability of the one-year statute. In that case the husband of a woman who had suffered personal injuries while a passenger upon a trolley car of the defendant sued to recover for the loss of his wife’s services and for medical expenses paid out by him. Plaintiff in that action made two separate contentions in support of his position that the two-year section (§ 339) rather than the one-year (§ 340 (3)) should apply to such cause of action. The first of these was

that the action was one for breach of the defendant's contract, as a common carrier, to safely transport the plaintiff's wife, and the second was that the cause of action, *as to him*, was not one for personal injuries, but for damages to "his relative rights." The court rejected the first contention, saying, at page 36,

"In such actions where, as here, the breach of duty and the consequent injury to the passenger are set forth, such violation of its obligation by the common carrier is the *gravamen* of the action which arises *ex delicto* and not *ex contractu*."

Of even more importance to the problem here presented was the court's rejection of the argument that the two-year period should apply because the action *as to the husband* was not one for personal injuries but for damages to the husband's "relative rights." In this connection the court said, at pages 36-37,

"It has been held that the word 'for' means 'by reason of,' 'because of' and 'on account of' and that a statute prescribing a limitation on 'actions for injury to the person . . . caused by negligence' should be interpreted to mean 'actions' 'by reason of' or 'because of,' or 'on account of' injuries to the person caused by negligence.' (*Sharkey v. Skilton*, 83 Conn. 503 [77 Atl. 950].) Applying this rule to our own statute we must hold that the language of section 340 quoted above refers to actions for damages 'on account of' personal injuries. In *Sharkey v. Skilton*, the plaintiff was the husband of the injured woman and there, as here, counsel sought to make a distinction between the direct injury to the wife and the indirect damage and loss to the husband, but the

court held that both harmful results had their efficient cause in the accident to her and that therefore the same statute of limitations applied to actions in which the wife was a party and to those in which the husband sued alone because of his relative rights."

The cited cases plainly demonstrate that the one-year statute is applied in California to every action where the conduct complained of is alleged to be negligence resulting in personal injuries or death.

The cited cases also demonstrate clearly that the rule is not affected by the fact that plaintiff was not directly or personally injured but damaged only through his relation to the injured party, nor by the fact that as between the person damaged in his relational interest and the negligent defendant the liability of the latter was based on either a contract or a statute.

(c) The Judgment of the District Court Was Proper Whether the One-Year or Two-Year Period Applied Because the Cause of Action Arose at the Time of the Negligence Complained of Which Was In Excess of Five Years and Five Months Before Suit Was Commenced.

Appellant argues, without citation of a single authority in support, that the cause of action upon which it sues did not arise at the time of the claimed negligent acts and resulting death, but only after the employer Ben Mast Lumber Co. had paid the judgment against it (Appellant's Opening Brief, pp. 13-14). The law of California, and some other jurisdictions as well, is directly to the contrary and it is

well settled in California that the cause of action based upon defendant's negligence or other tortious conduct arises immediately upon the act complained of despite the fact that such conduct might also constitute a breach of contract or statute.

In *Wood v. Currey*, 57 C. 208, plaintiff sued defendant for damages allegedly incurred by reason of the defendant's conduct in wrongfully causing a levy of execution against plaintiff's property, despite the fact that plaintiff had theretofore satisfied the judgment in question. Prior to instituting the action in question, plaintiff had successfully challenged the wrongful execution, by a separate proceeding in equity, and had received from the court an injunction perpetually restraining enforcement of the execution. The instant action was one to recover damages arising out of the wrongful execution and was not instituted until some two years and five months after the execution was originally levied but within one year from the affirmance by the Supreme Court of California of the injunction permanently enjoining enforcement of the execution. The court, having first determined that the two-year statute applied, went on to hold that the cause of action arose upon the date of the wrongful levy and was not postponed, as contended by the plaintiff therein, until all of the damages therefrom had accrued. The court said, at pages 209-210:

“ . . . When the defendant caused an execution to be issued upon the satisfied judgment, and to be levied upon the property of the plaintiff, he was guilty of a breach of duty which rendered

him amenable to the plaintiff for damages. This breach of duty constituted the gist of the action which the plaintiff brought against the defendant, and his right of action accrued at the time of the breach of duty, and not when the judgment in the injunction suit was rendered or affirmed by the appellate tribunal. And the Statute of Limitations commenced to run from the time of the alleged breach of duty. When misconduct or negligence constitutes a cause of action, the Statute of Limitations begins to run from the time when the defendant had been guilty of such misconduct or negligence. (*Pillar v. S. P. R. Co.*, 52 Cal. 43; *Harpending v. Meyer*, 55 id. 555; *Howell v. Young*, 5 Barn. & C. 266.) The running of the statute in this case, therefore, commenced on the 4th of March, 1873—the day when the execution was wrongfully issued and levied—and it was not suspended by the injunction proceedings to restrain the enforcement of the execution.

“But it is contended, that the damages which plaintiff was entitled to recover did not accrue until the litigation resulting from the suit by injunction had been ended by the judgment of the Supreme Court. Damages which result from a tort do not constitute separate causes of action. They are parts of the tort itself, for which the cause of action is given; and the cause of action arises immediately on the happening of the injury, and is not postponed to the damages thereby occasioned. (Angell on Lim. §§ 298-300.)

“As the time prescribed by the statute had run before the plaintiff commenced his action, his cause of action was barred.

“Judgment affirmed.”

The case of *Lattin v. Gillette*, 95 C. 317, 30 P. 545 (1892) is to the same effect and again demonstrates that whether the cause of action is thought to be in tort or contract does not alter the fact that the cause arises immediately upon the happening of the alleged negligent conduct. In that case the defendant, an abstractor of titles, was employed by plaintiff to examine and report upon a title to certain real property. On June 12, 1886, defendant gave to plaintiff a certificate showing a good title in the seller from whom plaintiff thereupon purchased the property in question. Thereafter, and within two years of the commencement of the cited action, plaintiff was put to the cost and expense of defending a legal action attacking his title and did in addition suffer a judgment against him which deprived him of one-half of the land. His action to recover such damages from defendant was commenced in May of 1890. The question to be decided was whether the two-year period provided by Code of Civil Procedure commenced to run upon the date that defendant delivered to plaintiff the faulty abstract of title or only after the judgment which established his damages, was made. The court, in rendering its judgment dismissing the action, upon the grounds that the cause of action arose immediately upon the delivery to plaintiff of the faulty abstract, said, at pages 319-320:

“The statute of limitations begins to run against a cause of action as soon as the right of action has accrued. Upon the breach of any special contract, the statute begins to run at the date of the breach, and a right of action growing out of the negligence

of another accrues whenever the act of negligence is complete. 'When misconduct or negligence constitutes a cause of action, the statute of limitations begins to run from the time when the defendant had been guilty of such misconduct or negligence.' (*Wood v. Currey*, 57 Cal. 209.) Whether the negligence out of which the cause of action arises is the breach of an implied contract, or the affirmative disregard of some positive duty, is immaterial. In either case, the liability arises immediately upon such breach of contract or disregard of duty, and an action to recover the damages which are the measure of such liability may be immediately maintained. The right to maintain the action is distinguished from the measure of damages, and although the entire damage resulting from such negligence may not have been sustained, or the fact that the negligence occurred may not have been known until the right to a recovery is barred, yet the time within which an action may be brought is not thereby prolonged."

* * *

"The running of the statute was not suspended by the fact that the plaintiff did not ascertain the error in the certificate, or by the fact that the existence of the error was not determined by the superior court until more than two years had expired. The judgment of the court did not constitute the negligence of the defendants, but was only evidence that they had been guilty of negligence; and the eviction of the plaintiff under such judgment was not the cause of action against the defendants, but was merely an element in determining the amount of damages that he had sustained by reason of their negligence."

That the cause of action there involved was upon the implied contract of the defendant to use skill and care in his employment (the same contention which appellant makes in the instant cause), is made clear by the court's discussion at page 323, where it said:

"As in the case of an erroneous deed drawn by an attorney, or a defective plat made by a surveyor, or a wrong prescription given by a physician, it (the certificate of title) is only evidence in support of the averment that the implied contract for the exercise of skill and care was violated, and is not the contract itself. That was created by the oral agreement of employment, and was broken by the giving of the faulty writing."

The contention made by appellant that its cause of action could not have matured until all of its alleged damage had accrued by payment of the judgment is plainly erroneous, as the above cited decisions make clear. Nor does such possibility result in any necessary hardship to the holder of such an alleged cause of action for the law of California plainly permits the alleged indemnitee (assuming without admitting that appellant's complaint herein shows it to be an indemnitee) to commence his action against the alleged indemnitor immediately upon the filing of the suit by the injured party. The matter was squarely decided in the case of *Atherley v. MacDonald, Young and Nelson*, 135 C. A. 2d 383, 287 P. 2d 529 (1955), wherein the court stated, at pages 386-387:

"If the main action were on contract the decided cases in this state would compel the holding that one defendant is entitled to file a cross-complaint

against a codefendant upon a contract to indemnify him against the liability sought to be enforced by the plaintiff. [6] The rule with the cases supporting it was thus stated in *Television Arts Prod. v. J. Fairbanks, Inc.*, 134 Cal. App. 2d 293, at p. 297 [285 P. 2d 695]: 'Where several persons are sued upon a demand, against which one defendant has agreed to indemnify another, the latter may have his rights to indemnify determined by means of a cross-complaint. It was so held in *Eastin v. Roberts, Carpenter & Co.*, 19 Cal. App. 2d 567 [66 P. 2d 224]; *County of Humboldt v. Kay*, 57 Cal. App. 2d 115 [134 P. 2d 501]; *Sattinger v. Newbauer*, 123 Cal. App. 2d 365 [266 P. 2d 586].'

"The fact that in our case the main action is in tort while in the cases cited above it was in contract does not in our opinion furnish any sound distinction between the cases. The 'transaction' clause of section 442 is at least as broad in its language as the 'transaction' clause of section 427, subdivision 8, Code of Civil Procedure, which permits the joinder in one action of '(c)laims arising out of the same transaction.' This has been construed to permit the joinder of an action in tort and an action against one who by contract has assumed a direct liability for such tort. (*Kane v. Mendenhall*, 5 Cal. 2d 749, 753 [56 P. 2d 498]; *Grier v. Ferrant*, 62 Cal. App. 2d 306, 313 [144 P. 2d 631].)"

Even though appellant were correct in its assertion that its cause of action would not arise until it had been damaged, it nevertheless is entirely obvious that its action would be barred by either the one-year or

two-year period of limitations in this case. The complaint herein alleges that the suit of the Rasmussen heirs was commenced on March 8, 1952 (T.R. p. 5), some four years and five months before the commencement of the instant action. Certainly the District Court was entitled to judicially notice that appellant was, therefore, immediately after March 8, 1952, *damaged* by payment of the necessary filing fees and other court costs attendant upon the filing of its answer to such action. In this connection it should also be noted that appellant seeks to recover herein just such legal costs and expenses in the sum of \$1,013.62, as well as attorney's fees and the amount eventually paid in satisfaction of the judgment (T.R. p. 6). Certainly it must follow from the application of the argument made by appellant itself that the payment of such legal costs and expenses constituted *damages* which were then and there (in March 1952) recoverable from appellees. If appellant was therefore *damaged* in March 1952 by payment of such court costs and filing fees, its cause of action to recover the same then arose and whether the period of limitations was one year or two years is now barred. The fact that further damages may have thereafter accrued can not, as the cases above cited hold, serve to prevent or postpone the arising of the cause of action beyond the date upon which damage first accrued.

A situation which is identical in its substantial effects to that here presented, frequently occurs in the relationships between manufacturers, retailers, and consumers. The case of *New Amsterdam Casualty*

Co. v. Baker, 74 F. Supp. 809 (D. C., Maryland, 1947) is illustrative of such type cases and the opinion therein again indicates that appellant's position is unsound. In that case one Baker, on August 19, 1941, sold a quantity of chenille robes to a retailer, Lansburgh & Bros. Thereafter Lansburgh & Bros. on January 3, 1942, sold one of the robes to Doris Deffebach. On January 17, 1942, Deffebach received substantial personal injuries when the robe caught fire. Deffebach commenced an action for damages for breach of warranty against Lansburgh & Bros. That action was prosecuted through the courts until, in November, 1945, the United States Supreme Court denied Lansburgh & Bros.' petition for a writ of certiorari. Thereafter Lansburgh & Bros., through its insurance carrier, paid to Deffebach the sum of \$13,000 in settlement of its liability. On December 12, 1946, the New Amsterdam Casualty Co., as subrogee of Lansburgh & Bros., commenced its action for breach of warranty against Baker to recover the damages sustained by it in settling the Deffebach claim. The defendant Baker moved for summary judgment on the grounds that the period of limitations had expired before commencement of the action. The court in granting defendant's motion for summary judgment, said at page 810:

"The question in the case, therefore, becomes limited to the inquiry, whether the running of the period of limitations was postponed until the acknowledgment of liability by Lansburgh and the consequent determination of the amount of damages by the insured; or, in other words, when did the statute of limitations begin to run in this case."

The court, after careful consideration of the pertinent authorities, noted, in holding that the cause of action accrued when Lansburgh & Bros. purchased the robe in question or in any event when it learned of the claimed breach of warranty from Deffebach, said, at page 812:

“Counsel for the plaintiff submits the general argument to the effect that limitation ordinarily does not begin to run until there is an existing cause of action. It is true, of course, in this case that the insurer had no cause of action until it paid the loss (within the three year period), but it is likewise clear that it is suing only as a subrogee of Lansburgh who did have a cause of action at least when the defect was first discovered which, however, was beyond the three-year period. It is plausibly argued that while Lansburgh theoretically may have had a cause of action when the defect was first discovered, it was not practicable for him to bring suit against Baker until the fact both of breach of warranty with respect to the nature of the goods and the amount of the damages therefor had been established. And therefore the realistic view is urged that in a case of this nature the beginning of limitations should be postponed until the ascertainment of the amount of damages. And in this connection it is further urged that, Baker, being informed of the pending litigation and offered an opportunity to assist in the defense, has not really been prejudiced by the delay in the suit. Or, in other words, that Lansburgh and its subrogee, the present plaintiff, had not been guilty of laches. But however plausible this argument may seem, I can find

no established principle of the law of limitations to support it; and the case must be decided on the law as it is and not on what the court may think it should be."

The only possible distinction of substance between the relationship of the various parties in that action and the relationship of the parties herein is that here the alleged liability of appellees arises out of the negligence charged against them, whereas the foundation of liability in that action was the defendant's alleged breach of the contract of warranty. Such distinction can serve only to make the application of the rule even more abundantly clear in this case.

(d) The Master's Right of Action Against His Servant Is Based on Negligence and Principles of Tort Law.

Appellant has, in his opening brief, variously described the liability of the servant to his master for damages occasioned by the servant's negligence as being a liability for "indemnity" or "restitution" (T.R. p. 15). Appellant, however, apparently does not dispute that the supposed liability is founded upon the alleged *negligence* of the employees and indeed says:

"The principle for which we contend—that an innocent employer has a cause of action for indemnity or restitution against his *negligent* employees . . ." (T.R. p. 10). (Emphasis added.)

That the alleged liability of the employee is in fact entirely based, and dependent, upon negligence is also made clear by the statutory law of the State of Cali-

fornia. Sections 2802 and 2865 of the Labor Code of the State of California define the nature and extent of the obligations arising out of the employer-employee relationship as they affect the employer and employee respectively. These sections provide as follows:

“§2802. *Indemnification of employee for expenditures or losses in discharge of duties or obedience to directions.* An employer shall indemnify his employee for all that the employee necessarily expends or loses in direct consequence of the discharge of his duties as such, or of his obedience to the directions of the employer, even though unlawful, unless the employee, at the time of obeying such directions, believed them to be unlawful.”

“§ 2865. *Liability for culpable negligence: Liability of employer for services.* An employee who is guilty of a culpable degree of negligence is liable to his employer for the damage thereby caused to the employer. The employer is liable to the employee if the service is not gratuitous, for the value of the services only as are properly rendered.”

It will be noted that although the Labor Code has imposed a duty of *indemnification* upon the *employer* it has provided as to the employee a liability which is strictly within the concept of tort law. Obviously the legislature having provided in the one instance for indemnity intended, by eliminating such right as against an employee, that as to such employee no right of indemnification should exist and that the employer's rights against the negligent employee are founded solely upon tort. Inasmuch as the complaint herein

does not seek to allege any special contract between appellant and appellees, other than that implied by law from the employer-employee relationship, the quoted provisions of the Labor Code are the entire measure of appellees' liability to appellant. These Labor Code sections, upon their face, establish that the only cause of action which appellant could have had was the common law cause of action for negligence. The California case authority previously cited establishes that such cause of action arose at the time of the negligent acts alleged and was barred at least four months before the present action was commenced.

CONCLUSION.

It is respectfully submitted that, whether the proper period of limitations to be applied to appellant's alleged cause of action is one year or two years, the action was barred before suit was commenced herein, and that the District Court's judgment of dismissal should be sustained.

Dated, San Francisco, California,
March 17, 1958.

Respectfully submitted,

J. D. BURDICK,

Attorney for Appellees.

No. 15696

United States
Court of Appeals
for the Ninth Circuit

MARTY W. LANDAU, doing business as River-
side Rancho, Appellant,
vs.

ROBERT A. RIDDELL, individually and as Dis-
trict Director of Internal Revenue for the
Sixth District of California, Appellee.

Transcript of Record

Appeal from the United States District Court for the
Southern District of California,
Central Division

FILED

NOV 19 1957

PAUL F. G. - ENCL. FRK



No. 15696

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United States Attorney,

EDWARD R. McHALE,
Assistant United States Attorney,
Chief, Tax Division,

JOHN G. MESSER,
Assistant United States Attorney,
808 Federal Building,
Los Angeles 12, California. [1]*

* Page numbers appearing at bottom of page of Original Transcript of Record.

In the District Court of the United States, Southern District of California, Central Division

No. 20341-BH

MARTY W. LANDAU, doing business as RIVERSIDE RANCHO, Plaintiff,

vs.

ROBERT A. RIDDELL, individually and as District Director of Internal Revenue for the Sixth District of the State of California, Defendant.

COMPLAINT

(For Recovery of Excise Taxes—Admissions, Cabaret—Illegally Collected)

Plaintiff complains of the defendant and for cause of action alleges as follows:

I.

That at all times herein mentioned plaintiff Marty W. Landau was and now is an individual doing business under the fictitious name and style of Riverside Rancho at 3213 Riverside Drive, City of Los Angeles, County of Los Angeles, State of California; that plaintiff is a citizen of the United States of America, residing within the County of Los Angeles, State of California.

II.

That at all times herein mentioned the defendant Robert A. Riddell was and now is the duly ap-

pointed acting [2] Collector of Internal Revenue, now known and designated as the Assistant Director of Internal Revenue, for the Sixth District of the State of California, acting for and on behalf of the United States of America.

III.

That Robert A. Riddell is made the defendant herein in accordance with and by virtue of Sections 1346 and 1491 of the Judicial Code of the United States of America.

IV.

That between on or about the 1st day of December, 1949, and on or about the 1st day of November, 1951, plaintiff duly filed with the defendant herein his excise taxes—admission (also known as cabaret taxes) tax reports and returns, in accordance with the revenue acts of the United States of America then in effect, to-wit, and more particularly, Section 1700(a) and Section 1700(e) of the Internal Revenue Code of the United States of America; that at the time of such filings, and for said periods, plaintiff paid to the defendant, as Collector of Internal Revenue, the total sum of Nineteen Thousand Five Hundred Ninety and 93/100 (\$19,590.93) Dollars, said amounts being paid by plaintiff under protest for the reason that such cabaret taxes were not legally due from plaintiff because plaintiff was not during said times operating a cabaret. That the periods for which said taxes were paid and the amounts thereof, will

more clearly appear from an itemized list thereof which is a part of Exhibit "A", attached hereto, and by this reference made a part hereof.

V.

That on the 25th day of January, 1954, plaintiff filed his written claim for a refund of the amount of said taxes, or such greater amount as might be legally refundable, with defendant herein, a full true and correct copy of which claim is attached [3] hereto, marked Exhibit "A", and by this reference made a part hereof; that said claim for refund was based on the ground that plaintiff was not liable for the payment of cabaret taxes, and said taxes were erroneously paid over to the defendant.

VI.

That thereafter on or about the 15th day of March, 1956, the defendant notified plaintiff that said claim for refund was rejected, and neither said amount so collected, nor any part thereof, has been repaid to plaintiff.

VII.

That in April, 1947, plaintiff commenced the operation of a ballroom for dancing, known by the fictitious name of Riverside Rancho, at 3213 Riverside Drive, City of Los Angeles, County of Los Angeles, State of California; that from said date to the present date plaintiff operated, and is still operating, said Riverside Rancho as a ballroom, charging an admission price ranging from \$1.00 to \$1.20 per person, including federal tax, except for

ladies on Wednesday and Sunday nights when they were admitted for 20c; that persons paying such admission price were not allowed to pass out of the ballroom and return to the ballroom without paying a second and new admission fee; that said business is licensed as a ballroom by the City of Los Angeles, State of California.

VIII.

That at all times herein mentioned plaintiff also operated a "milk bar" in the patio of said Riverside Rancho ballroom business; that said "milk bar" was and is located in a building separate and apart from the ballroom and at a distance of approximately 35 feet from the ballroom building; that at all times herein mentioned plaintiff also operated a "bar" serving liquors and beer, which "bar" was and is located off and away from the ballroom, completely separated therefrom by a solid [4] wooden partition; that at all times herein mentioned plaintiff also operated a "dining room" on the second story of a building separate and apart from the ballroom and approximately 75 to 100 feet therefrom.

IX.

That an orchestra playing dance music was employed by plaintiff to play music for the dancing of the ballroom customers; that at no time was it possible for the customers in the "bar", "milk bar" and/or "dining room", hereinabove referred to, to hear or dance to the orchestra playing in the ballroom; that at no time was it possible for any cus-

tomers in the "bar", "milk bar" and/or "dining room" to see and/or view the orchestra or the dancers and customers in the ballroom.

X.

That no entertainment of any kind was furnished to the ballroom customers in addition to the dance music hereinabove referred to; that no refreshments of any kind were served in the ballroom; that no food or beverage was allowed to be carried into the ballroom; that no tables or chairs were provided for the customers in the ballroom with the exception of benches placed along the wall which were provided so that the customers in the ballroom could rest between dances.

XI.

That since December, 1947, plaintiff's ballroom and nearby "bar", "milk bar" and "dining room" were diligently constructed, operated and remodeled by plaintiff in strict compliance and conformity with the advice of defendant's qualified agents, employees and officials of the Internal Revenue Bureau of the United States of America, said advice being given to plaintiff for the express purpose of classifying plaintiff's business as a ballroom and therefore not subject to a "cabaret tax" as provided in Section 1700(e) of the Internal Revenue Code. [5]

XII.

That in complete disregard of plaintiff's rights as a ballroom operator, as aforesaid, the defendant wrongfully and unlawfully assessed a tax of

\$19,590.93 upon plaintiff's said ballroom operation as a cabaret; that said tax was paid by plaintiff under protest, as aforesaid.

XIII.

That by reason of the premises the defendant became indebted and is indebted to plaintiff in the sum of \$19,590.93, together with interest thereon; that no part of said sum has been repaid to plaintiff.

Wherefore, plaintiff prays judgment against the defendant for the sum of \$19,590.93, together with interest thereon at the rate of Seven per cent (7%) per annum from the dates of payment; and for plaintiff's costs of suit incurred herein; and for such other and further relief as to the Court may seem just and proper in the premises.

ENGEL & YARDUM,
/s/ By LE VONE A. YARDUM,
Attorneys for Plaintiff. [6]

Duly Verified. [9]

[Exhibit A—Claim for Refund is set out at pages 67-69 as part of Plaintiff's Exhibit 4.]

[Endorsed]: Filed August 21, 1956.

[Title of District Court and Cause.]

ANSWER

Now comes the above-named defendant, by his attorney, Laughlin E. Waters, United States Attorney in and for the Southern District of California, and for his answer to the complaint filed herein alleges and says:

1. Admits the allegations contained in paragraph numbered I thereof.

2. Admits the allegations contained in paragraph numbered II thereof.

3. Admits the allegations contained in paragraph numbered III thereof.

4. Admits the allegations contained in paragraph numbered IV thereof, except that it is denied that the cabaret taxes referred to in said paragraph were not legally due from plaintiff; and except that it is denied that plaintiff was not during the periods involved operating a cabaret; and except that it is denied that the cabaret taxes referred to in said paragraph were paid under protest.

5. Admits the allegations contained in paragraph numbered V thereof, [10] except that each and every allegation set forth in the claim for refund filed by plaintiff, copy of which is attached to the complaint as Exhibit A, is denied.

6. Admits the allegations contained in paragraph numbered VI thereof.

7. Denies the allegations contained in paragraph VII thereof, except admits that in April, 1947, plaintiff commenced the operation of his business, known by the fictitious name of Riverside Rancho, at 3213 Riverside Drive, City of Los Angeles, County of Los Angeles, State of California, and that from said date to the present date plaintiff operated and is still operating said Riverside Rancho, charging an admission price ranging from \$1.00 to \$1.20 per person, including federal tax, except for ladies on Wednesday and Sunday nights when they were admitted for 20c.

8. The defendant is presently without knowledge or information sufficient to form a belief as to the truth of all the allegations contained in paragraph numbered VIII thereof.

9. Denies the allegations contained in paragraph numbered IX thereof, except that it is admitted that an orchestra playing dance music was employed by plaintiff to play music for the dancing of plaintiff's customers as alleged in said paragraph.

10. Denies the allegations contained in paragraph numbered X thereof.

11. The defendant is presently without knowledge or information sufficient to form a belief as to the truth of all the allegations contained in paragraph numbered XI thereof.

12. Admits the allegations contained in paragraph numbered XII thereof, except that it is

denied that the defendant wrongfully and unlawfully assessed a cabaret tax of \$19,590.93 upon plaintiff's business operation, and except that it is denied that said tax was paid by plaintiff under protest.

13. Denies the allegations contained in paragraph numbered XIII thereof, except that it is admitted that no part of the cabaret tax sought to be recovered herein has been repaid to plaintiff.

Wherefore, the defendant prays that the complaint filed herein be dismissed with costs to be assessed against the plaintiff.

LAUGHLIN E. WATERS,
United States Attorney,

EDWARD R. McHALE,
Assistant U. S. Attorney,
Chief, Tax Division,

JOHN G. MESSER,
Assistant U. S. Attorney,

/s/ JOHN G. MESSER,
Attorneys for Defendant,
Robert A. Riddell. [12]

Affidavit of Service by Mail Attached. [13]

[Endorsed]: Filed October 26, 1956.

United States District Court, Southern District
of California, Central Division

No. 20341-BH Civil

MARTY W. LANDAU, etc., Plaintiff,

vs.

ROBERT A. RIDDELL, etc., Defendant.

UNITED STATES OF AMERICA,
Plaintiff in Intervention,

vs.

MARTY W. LANDAU, etc., ROBERT A. RID-
DELL, etc.,

Defendants in Intervention.

COMPLAINT IN INTERVENTION FOR
FEDERAL EXCISE TAXES

Comes Now the United States of America and by
leave of the Court, files this, its Complaint in Inter-
vention herein and alleges:

1. That the United States of America is a sov-
ereign and a corporate body politic.

2. This action in intervention is commenced at
the direction of the Attorney General of the United
States and is authorized and sanctioned by the
United States Commissioner of Internal Revenue.

3. Federal excise taxes for the period commenc-
ing October 1, 1950 and ending September 30, 1953

in the amount of [14] \$4,564.16 were assessed against the plaintiff and defendant in intervention Marty W. Landau, doing business as "Riverside Rancho," by the Commissioner of Internal Revenue of the United States. The said taxes, together with interest thereon in the amount of \$766.33, being assessed on the Commissioner's assessment list which was signed by the Commissioner and was received by the District Director of Internal Revenue on April 8, 1954.

4. The first notice and demand for payment of the aforesaid taxes and interest thereon was issued by the District Director of Internal Revenue on April 13, 1954.

5. On the date the assessment list was received by the District Director of Internal Revenue, the United States of America, intervenor herein, by virtue of the provisions of Section 3670 of the Internal Revenue Code of 1939, acquired liens against all property and rights to property of the defendant in intervention, Marty W. Landau, for the entire amount of the aforesaid taxes plus penalties and interest thereon according to law. A notice of said liens was duly filed with the County Recorder for Los Angeles County, State of California, on January 24, 1955, as No. 1940.

6. In January, February, March, May, June and August of 1955, the defendant in intervention, Marty W. Landau, made payments to the Commissioner of Internal Revenue against the aforesaid liability for excise taxes in the total amount of

\$880.49. No part of the balance of the aforesaid assessment in the amount of \$4,450.00, plus interest as provided by law, has been paid, and the entire amount thereof remains unpaid and due and owing from the defendant in intervention, Marty W. Landau, to the United States of America, which amount he has failed and refuses to pay to the United States of America notwithstanding demands for payment made upon him by or in behalf of the United States of America.

Wherefore, the United States of America, intervenor herein, prays: [15]

(a) That the Court enter judgment in its favor against the defendant in intervention, Marty W. Landau, in the sum of \$4,450.00, plus penalties and interest according to law.

(b) For such other and further relief as to the Court may seem just and proper.

LAUGHLIN E. WATERS,
United States Attorney,

EDWARD R. McHALE,
Assistant U. S. Attorney,
Chief, Tax Division,

JOHN G. MESSER,
Assistant U. S. Attorney,

/s/ JOHN G. MESSER,
Attorneys for United States of America, Plaintiff
in Intervention.

It Is Hereby Stipulated that the within Complaint in Intervention may be filed.

ENGGER & YARDUM,

/s/ By LE VONE A. YARDUM,

Attorneys for Plaintiff and Defendant in Intervention Marty W. Landau.

LAUGHLIN E. WATERS,
United States Attorney,

EDWARD R. McHALE,
Assistant U. S. Attorney,
Chief, Tax Division,

JOHN G. MESSER,
Assistant U. S. Attorney,

/s/ JOHN G. MESSER,
Attorneys for Defendant
Robert A. Riddell.

It Is So Ordered this 28th day of December, 1956.

/s/ BEN HARRISON,
Judge. [16]

[Endorsed]: Filed December 28, 1956.

[Title of District Court and Cause.]

ANSWER TO COMPLAINT IN
INTERVENTION

Comes now the defendant in intervention, Marty W. Landau, and in answer to plaintiff in inter-

vention's complaint on file herein, admits, denies and alleges as follows:

I.

Answering defendant in intervention denies generally and specifically, each and every, all and singular, conjunctively and disjunctively, the allegations contained in said complaint in intervention, and the whole thereof, particularly denying, but without limiting the generality of the foregoing denial, that answering defendant in intervention is indebted to plaintiff in [17] intervention in the sum of \$4,450.00, or any greater or lesser sum, or any sum at all.

Wherefore, answering defendant in intervention prays that plaintiff in intervention take nothing by its complaint in intervention and that the same be dismissed; that defendant in intervention have judgment for his costs of suit incurred herein, and for such other and further relief as to the Court may seem just and proper in the premises.

INGER & YARDUM,

/s/ By LE VONE A. YARDUM,
Attorneys for Defendant in Intervention Marty
W. Landau. [18]

Duly Verified.

Affidavit of Service by Mail Attached. [19]

[Endorsed]: Filed January 14, 1957.

[Title of District Court and Cause.]

DECISION

The above-entitled cause heretofore tried, argued and submitted, is now decided as follows:

Judgment will be against the plaintiff as follows:

(a) That plaintiff take nothing by the Complaint against the defendant, and

(b) That plaintiff in intervention, the United States of America, do have and recover from the plaintiff, under its Complaint in Intervention, the sum of \$4450.00 with penalties and interest according to law. Computation of total tax to be made by counsel under Local Rule 7(h). Costs to the defendant and plaintiff under intervention.

Formal Findings and Judgment to be prepared by counsel for the defendant and plaintiff in intervention under Local Rule 7. [20]

Comment

I am of the view that the plaintiff was subject to the cabaret tax imposed by Section 1700(e)(1) of the 1939 Act for the period December 1, 1949, to November 1, 1951.

While decisions from other Circuits are not necessarily binding, I am satisfied that the two Courts of Appeals which passed on the applicability of the tax to persons who, like the plaintiff, conducted dance halls, were correct in holding that such establishments were subject to the cabaret tax. [26

U.S.C.A., I.R.C., §1700(e)(1). See, *Avalon Amusement Corporation v. United States*, 7 Cir., 1948, 165 F. 2d 653; *Birmingham v. Geer*, 8 Cir., 1950, 185 F. 2d 82] So I do not hesitate to adopt their interpretation.

In the light of these decisions, the decision in the lower court in *Geer v. Birmingham*, D. C. Ia., 1950, 88 F. Supp. 189, which was specifically reversed by the Court of Appeals in *Birmingham v. Geer*, *supra*, and the fact that a Committee of the Congress, subsequent to the promulgation of the decisions, may have stated that the lower court's opinion accords with congressional intent, while those of the Courts of Appeals do not, loses all meaning. When Courts and the Congress disagree on statutory interpretation, the only way in which the conflict can be resolved is for the Congress to change the law. Otherwise, the opinion of the Courts must prevail. For the Congress cannot tell courts to interpret a statute in a certain manner. It speaks only through the language of the statute. And where the language is clear, [21] legislative history before the passage of the Act loses all significance, and attempted legislative interpretation after the passage of the Act carries no weight. [See, *Greenwood v. United States*, 1956, 350 U. S. 366, 374; *United States vs. McKesson & Robbins*, 1956, 351 U. S. 305, 315.] The Congress of the United States did make its interpretation of the Section under consideration prevail in the only manner permitted,—namely, by amending it in 1951 so as to specifically exempt from the tax ballrooms,

dance halls or other similar places where the service of food and refreshments are incidental only.

We are asked to interpret the Act retrospectively so as to grant relief to the taxpayer. Two considerations stand in the way: (1) The fact that no statute, not even a tax statute, is given retrospective effect unless it is such by its very terms, and (2) the Congress itself in amending the Act, stated that it shall be effective prospectively only. The language it used reads:

“The amendment made by subsection (a) shall be applicable only with respect to periods after 10 antemeridian on the first day of the first month which begins more than ten days after the date of the enactment of this Act.”

The Court of Appeals for the 8th Circuit, the same Court which decided *Birmingham v. Geer*, supra, had occasion to pass upon this matter also in a group of consolidated cases which are reported under the title *Peony Park v. O'Malley*, 8 Cir., 1955, 223 F. 2d 68. It held that the particular statute was not retrospective. Certiorari in the case was denied by the Supreme Court. [*Peony Park v. O'Malley*, 1955, 350 U. S. 845] [22] I agree with this conclusion.

In the light of what precedes, the position of the plaintiff in this case is not tenable.

Hence the ruling above made.

Dated: May 2, 1957.

/s/ LEON R. YANKWICH,

Chief Judge. [23]

[Endorsed]: Filed May 2, 1957.

United States District Court, Southern District
of California, Central Division

No. 20341-BH Civil

MARTY W. LANDAU, doing business as RIVER-
SIDE RANCHO, Plaintiff,

vs.

ROBERT A. RIDDELL, etc., Defendant.

UNITED STATES OF AMERICA,
Plaintiff in Intervention,

vs.

MARTY W. LANDAU, etc.,
Defendant in Intervention.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

This cause came on for trial on April 29, 1957, before the Hon. Leon R. Yankwich, Chief Judge, presiding, without the intervention of a jury. Plaintiff was represented by his counsel, Enger & Yardum, by LeVone A. Yardum, and the defendant was represented by his counsel, Laughlin E. Waters, United States Attorney, Southern District of California, Edward R. McHale, Assistant United States Attorney, Chief, Tax Division, and John G. Messer, Assistant United States Attorney. The Court, having heard and considered all the evidence, stipulation of facts, memoranda and argu-

ments of counsel, makes the following findings of fact and conclusions of law: [24]

Findings of Fact

I.

The plaintiff, Marty W. Landau, was a citizen of the United States, and a resident of the County of Los Angeles, State of California.

II.

At all times herein involved, plaintiff was an individual doing business under the fictitious name and style of Riverside Rancho, located at 3213 Riverside Drive, within the City of Los Angeles, County of Los Angeles, State of California. Said establishment provided dancing privileges and sold food, refreshment and checkroom service to those patrons desiring to avail themselves of such privileges, services, and merchandise.

III.

During the period December 1, 1949, to November 1, 1951, plaintiff filed excise (cabaret) tax returns and paid said taxes in the total sum of \$19,590.93.

IV.

On January 25, 1954, plaintiff filed a claim for refund of said excise taxes in the amount of \$19,590.93. On March 15, 1956, said claim for refund was rejected.

V.

In 1954, the Commissioner of Internal Revenue assessed additional excise (cabaret) taxes in the

amount of \$4,564.16, against plaintiff, for the period October, 1950 through October, 1951, together with interest thereon in the amount of \$766.33, or a total of \$5,330.49. At various times during the year 1955, plaintiff made payments against said additional assessment in the total amount of \$880.49 only, resulting in a balance in the amount of \$4,450.00 due and owing to the United States of America, with penalties and interest thereon according to law. [25]

VI.

On December 28, 1956, the United States of America, by leave of court, filed its complaint in intervention against plaintiff to recover said excise tax in the amount of \$4,450.00, together with penalties and interest thereon according to law.

VII.

Plaintiff was subject to the cabaret tax imposed by Section 1700(e)(1) of the Internal Revenue Code of 1939 for the period December 1, 1949, to November 1, 1951.

VIII.

Plaintiff did not sustain his burden of proving that his establishment was not subject to said cabaret tax during the period herein involved.

IX.

Plaintiff, during the period December 1, 1949 to November 1, 1951, was properly assessed a tax, correctly computed, of 20 per centum of all amounts paid for admission, refreshment, service, or merchandise at his establishment, Riverside Rancho,

by or for any patron or guest who was entitled to be present during any portion of the public performances for profit which plaintiff furnished at said Riverside Rancho during said period.

X.

The United States of America, plaintiff in intervention, sustained its burden of proving that plaintiff was, and now is, liable for the additional cabaret tax assessed for the period October, 1950 through October, 1951, in the sum of \$4,450.00, together with penalties and interest according to law, which were properly imposed.

XI.

All conclusions of law which are or are deemed to be findings of fact are hereby found as facts and incorporated herein as findings of fact. [26]

Conclusions of Law

I.

The Court has jurisdiction of the subject matter and of the parties hereto.

II.

Plaintiff did not sustain his burden of proving that his establishment was not subject to the cabaret tax imposed by Section 1700(e)(1) of the Internal Revenue Code of 1939 during the periods herein involved.

III.

Plaintiff was, and now is, liable to the United States of America, plaintiff in intervention, for

additional cabaret tax assessed for the period October, 1950 through October, 1951, in the sum of \$4,450.00, together with penalties and interest thereon according to law.

IV.

Plaintiff was subject to the cabaret tax imposed by Section 1700(e)(1) of the Internal Revenue Code of 1939 for the period December 1, 1949, to November 1, 1951.

V.

The amendment to Section 1700(e)(1), specifically exempting from the cabaret tax ballrooms, dance halls or other similar places where the serving and selling of food and refreshments are incidental only, is applicable only with respect to periods commencing November 1, 1951. [Peony Park v. O'Malley, 223 F. 2d 68, (8th Cir. 1955), Cert. denied, 350 U. S. 845]

VI.

Plaintiff is not entitled to any refund of cabaret tax for the period herein involved. Defendant is entitled to judgment dismissing the complaint herein, with prejudice, together with his costs. [27]

VII.

The plaintiff in intervention, United States of America, is entitled to recover from plaintiff additional cabaret tax assessed against plaintiff for the period October, 1950 through October, 1951, in the amount of \$4,450.00, together with penalties and interest according to law.

VIII.

All findings of fact which are or are deemed to be conclusions of law are hereby incorporated in these conclusions of law.

Judgment

In accordance with the foregoing findings of fact and conclusions of law, it is hereby ordered, adjudged and decreed:

(a) That the plaintiff take nothing by his complaint against defendant, and that the above-entitled action be dismissed with prejudice;

(b) That plaintiff in intervention, the United States of America, do have and recover from the plaintiff, under its Complaint in Intervention, the sum of \$5,327.22, with interest thereon at \$0.73 per day from the date of this judgment, until paid, plus \$0.50 for lien filing fee; and

(c) That the defendant have judgment for and shall recover from plaintiff the amount of defendant's costs, to be taxed by the Clerk of this Court in the sum of \$20.00.

Dated: This 15th day of May, 1957.

/s/ LEON R. YANKWICH,
Chief United States District
Judge. [28]

Affidavit of Service by Mail Attached. [29]

[Endorsed]: Filed May 15, 1957. Docketed and Entered May 16, 1957.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Marty W. Landau, doing business as Riverside Rancho, plaintiff and defendant in intervention in the above entitled action, hereby appeals to the Circuit Court of Appeals of the United States of America, Ninth Circuit, from the Judgment entered in said action on May 16, 1957, in favor of defendant and against the plaintiff, and also, the judgment rendered in said action in favor of plaintiff in intervention and against the defendant in intervention, and from the whole of said judgments.

Dated: July 15, 1957.

/s/ CLINTON F. SECCOMBE,
Attorney for Plaintiff and Defendant in Intervention. [33]

Acknowledgment of Service Attached. [34]

[Endorsed]: Filed July 15, 1957.

[Title of District Court and Cause.]

CERTIFICATE BY CLERK

I, John A. Childress, Clerk of the above-entitled Court, hereby certify that the items listed below constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit, in the above-entitled cause:

A. The foregoing pages numbered 1 to 39, inclusive, containing the original:

Complaint

Answer

Complaint in Intervention

Answer to Complaint in Intervention

Decision

Findings of Fact, Conclusions of Law and Judgment

Substitution of Attorneys

Notice of Appeals

Designation of Contents of Record on Appeal

Request for extension of Time for Filing Record on Appeal, etc.

B. Plaintiff's Exhibits 1, 2, 3, 4. Defendant's Exhibits A, B, C, D.

C. One volume of Reporter's Transcript of Proceedings had on April 29, 1957.

I further certify that my fee for preparing the foregoing record, amounting to \$1.60, has been paid by appellant.

Witness my hand and the seal of said District Court, this 3rd day of September, 1957.

[Seal]

JOHN A. CHILDRESS,
Clerk.

/s/ By WM. A. WHITE,
Deputy Clerk.

In the United States District Court, Southern
District of California, Central Division

No. 20341-BH Civil

MARTY W. LANDAU, doing business as RIVER-
SIDE RANCHO, Plaintiff,

vs.

ROBERT A. RIDDELL, etc. Defendant.

UNITED STATES OF AMERICA,
Plaintiff in Intervention,

vs.

MARTY W. LANDAU, etc.,
Defendant in Intervention.

TRANSCRIPT OF PROCEEDINGS

Los Angeles, California
Monday, April 29, 1957 [*]
2:00 P.M.

Honorable Leon R. Yankwich, Judge Presiding.

Appearances: For the Plaintiff and Defendant
in Intervention: Enger and Yardum, by Clifford
E. Enger, Esq., and LeVone A. Yardum, Esq., 9405
Brighton Way, Beverly Hills, California. For the
Defendant and Plaintiff in Intervention: Laughlin
E. Waters, United States Attorney, by John G.
Messer, Assistant United States Attorney.

* Page numbers appearing at top of page of Reporter's Original Transcript of Record.

The Clerk: Case No. 20341-BH Civil, Marty W. Landau v. Robert A. Riddell, etc.; and United States of America, intervening plaintiff, v. Marty W. Landau, intervening defendant, for trial.

Mr. LeVone A. Yardum,—is that correct?

Mr. Yardum: Correct.

The Clerk: And Mr. Clifford E. Enger,—is that correct?

Mr. Enger: Correct.

The Clerk: And Mr. John G. Messer for the Government.

Mr. Messer: Yes.

The Court: Gentlemen, I have gone over the file. Is there any additional testimony to be presented other than that which is contained in the statement of facts and the exhibits which you have attached to them?

Mr. Yardum: Yes, your Honor, there will be.

The Court: Then you take charge and introduce the statement of facts and the exhibits for the plaintiff, and the Government will offer those offered by them. I have gone over them, and the three briefs filed.

Mr. Yardum: I am not familiar with your practice here, your Honor. Do I have to introduce these exhibits into evidence?

The Court: That is right. They have to be [3] introduced. The statement of facts will be given your Exhibit No. 1, and then your other exhibits will be designated by number, and then the Government's exhibits will be offered as a part of their case. Then we know what we are starting with.

The Clerk: Shall I number those, Judge?

The Court: If there is no additional testimony, yes. Sometimes we don't do that, but when there is additional testimony you have to offer the stipulated facts.

Mr. Yardum: The plaintiff will offer in evidence the stipulation of facts which has heretofore been entered into between the plaintiff and the defendant.

The Court: Give us the file date.

Mr. Yardum: It was filed on December 14, 1956.

The Court: It may be received as Plaintiff's Exhibit 1.

(The document referred to was marked Plaintiff's Exhibit 1 and received in evidence.)

[See pages 59-66.]

The Court: Then we will take your exhibits. I think you have numbered them.

The Clerk: I haven't got them numbered yet, your Honor. I think I had better number them in order to keep them orderly.

The Court: All right. You take them.

The Clerk: Shall I number the photographs as one exhibit?

Mr. Yardum: Yes, that is satisfactory. [4]

The Court: You can mark them No. 2, and then give them letters.

The Clerk: Are these the only exhibits that you have?

Mr. Messer: And we have some which are already on file.

The Clerk: When were they filed?

Mr. Messer: The Government's exhibits——

The Court: They are there, right following.

The Clerk: I have them.

The Court: All right.

The Clerk: There have been marked for identification Plaintiff's Exhibits 1, 2, 3 and 4, and there have also been marked for identification Defendant's Exhibits A, B, C and D.

(The exhibits referred to were marked Plaintiff's Exhibits 2, 3 and 4, and Defendant's Exhibits A, B, C and D, for identification.)

Mr. Yardum: If your Honor please, at this time we would like to introduce into evidence as Plaintiff's Exhibit No. 1 a stipulation of facts entered into between the plaintiff and the defendant, and filed in this court on December 14, 1956.

The Court: It may be received.

Mr. Yardum: I would like to offer as Plaintiff's Exhibit 2 a sketch of the floor plan of the Riverside Rancho Ballroom. [5]

The Court: It may be received.

(The exhibit heretofore marked Plaintiff's Exhibit 2, was received in evidence.)

Mr. Yardum: I next offer as Plaintiff's Exhibit 3 a series of eight photographs of different portions of the Riverside Rancho. They are all marked Exhibit C on the sheets here. I believe that should be changed.

The Clerk: Those are Exhibit 3.

Mr. Yardum: Exhibit 3. I notice on the bottom they are marked No. C.

The Clerk: That is not the way we have them. May they be received in evidence, your Honor?

The Court: They may be received.

(The exhibit heretofore marked Plaintiff's Exhibit 3, was received in evidence.)

Mr. Yardum: I next offer as Plaintiff's Exhibit 4 the plaintiff's claim for refund—the original of the plaintiff's claim for refund of the excise taxes which are the subject of this action.

The Court: All right. It may be received.

(The exhibit heretofore marked Plaintiff's Exhibit 4, was received in evidence.)

[See pages 66-71.]

Mr. Messer: May we at this time offer our exhibits in evidence?

The Court: Let's not do that. If he is going to offer [6] any oral testimony, I would rather have him complete his case, and then you can offer yours.

Mr. Messer: All right.

Mr. Yardum: Mr. Landau. I will call Mr. Marty Landau.

MARTY WOLF LANDAU

called as a witness on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: What is your full name, sir?

The Witness: Marty Wolf Landau, L-a-n-d-a-u.

Direct Examination

Q. (By Mr. Yardum): Mr. Landau, you are the plaintiff in this action, are you not?

(Testimony of Marty Wolf Landau.)

A. Yes, sir.

Q. And are you the proprietor of the Riverside Rancho? A. Yes, sir.

Q. Would you tell the court when you first took over the operation of that Riverside Rancho?

A. In April of 1948, after it burnt down. It burnt down in 1947, and I took it over in 1948 and rebuilt it.

Q. Now, these excise taxes, for which you have brought an action to recover, were these taxes paid under protest, Mr. Landau? [7]

A. Yes, they were, every one of them. I can give an explanation for that, if the court will allow me.

Q. Yes, you may.

Mr. Messer: Your Honor, may I object to this here? I don't believe that it is necessary to go into all of these taxes. I mean, we haven't raised any issue as to when these taxes were paid.

The Court: There was no question raised about the timeliness of it.

Mr. Yardum: It was denied in the answer.

The Court: I beg your pardon?

The Witness: Originally the claim was for \$58,000, your Honor.

The Court: All right. In view of the fact that it is denied in the answer, you may go ahead.

Q. (By Mr. Yardum): Just explain to the court how these taxes were paid under protest.

A. Originally there was a Mr. Clayton up in the tax office. I went up to see Mr. Clayton, and

(Testimony of Marty Wolf Landau.)

asked him to come down right after the fire and look the ballroom over.

Prior to that time the gentleman that had it had tables and chairs and entertainment in the ballroom. Downstairs he had an Esquire Room, with entertainment, and upstairs in the dining room, which was at that time called the Hawaiian Hut, he had a band and entertainment up there. [8]

So I went to see Mr. Clayton about it. He said, "Well, I will come out and look at it for you."

He come out there, and looked at it, and he said, "Well, in order to make this a separate building, I don't think you will have to worry about paying a cabaret tax, I would build a complete wall," where there was two entrances that you could get in and out from the bar.

Mr. Messer: Your Honor, I object to the testimony as to the statements made by Mr. Clayton, as to what he should do in the establishment. I don't believe that would be proper evidence at this time, and is entirely hearsay.

The Court: The Government is not estopped by any statement by an agent that a certain thing is taxable or not taxable, because no one short of the Secretary of the Treasury can determine that matter. If there was a question of bad faith, I think it might go to the good faith of the taxpayer, but that isn't the question.

Mr. Yardum: The question here is, your Honor,——

The Court: I beg pardon?

(Testimony of Marty Wolf Landau.)

Mr. Yardum: The only point here is that we want to bring out, if the court will allow us, that Mr. Landau constructed or reconstructed this ball-room pursuant to instructions which he received from the Treasury Department.

The Court: That would not determine taxability, unless the Secretary of the Treasury himself did that, and I doubt [9] even if the Secretary of the Treasury could waive a tax.

I think I will let it go in, but merely as going to his good faith in making this claim and in paying under protest. I will let it go to that, but there is no estoppel arising against the Government, because there are thousands of subalterns in the Internal Revenue Department, and there are hundreds in this District, and because someone makes a statement to this man that if he did certain things he would not have to pay a tax would not govern. If that were true, we would be trying every day the question of whether a certain person in the Department had promised immunity, which he had no right to do. No one can bind the United States Government in that manner.

However, I will allow it to go in merely as an indication of good faith.

Mr. Yardum: We shall offer it for that purpose, your Honor.

The Court: All right.

Mr. Messer: I understand that Mr. Clayton is now dead, and we would have a bad time trying to refute anything that the man may have said.

(Testimony of Marty Wolf Landau.)

The Court: Well, I will allow it merely as going to good faith. Go ahead.

The Witness: Then after Mr. Clayton became very ill, Mrs. Herbell was in the department, and I was turned over to [10] Mrs. Herbell, and she said—Mrs. Herbell told me that she had talked to Mr. Clayton, and that Mr. Clayton had advised her that if I was going to pay the cabaret taxes, I should take these forms and split it up as to which was admission taxes—on these forms that I don't recall the numbers of.

Will you look it up there, counsel, and see what they are? I can't remember the numbers. That is from the day I went into business, to put it on the yellow forms that you have in front of you there, and those forms they advised me—Mrs. Herbell advised me to split them up, showing admission taxes and cabaret taxes, which I did.

I did that there from approximately 1948 to 1949. I kept asking Mrs. Herbell to get someone out there to give me a decision, because I was paying these taxes out of my own pocket.

So finally Mr. O'Connor come out there. Mr. O'Connor come out there, and he looked it over, and he says, "You know that you certainly have changed this building." He says, "I am the one that originally assessed the former owner here \$16,000 for cabaret tax."

So Mr. O'Connor advised me to take pictures of the Riverside Rancho, and that he would try to get

(Testimony of Marty Wolf Landau.)

me a decision if I was liable under the cabaret tax or not.

We met there with the photographer, and we took these pictures of the Riverside Rancho. At that time Mr. O'Connor [11] helped me fill out a claim for \$58,000.

We sent it in, and I waited from 1949, '50, '51, '52 and '53. I kept asking the Government, and bothering the Government, and everything.

In the meantime Mr. O'Connor come out to see me again. He was sent out there. He checked all my books, and even during checking my books there, he found a deal where I used to have ladies 20 cent a night, and I had given the Government the whole 20 cents, and he wondered why I had done that. He said I should only have given 20 per cent of 20 cents, which was four cents. So I put in a claim for \$4800 on that.

Prior to that time I was paying cabaret tax on private parties.

Mr. O'Connor took me in to Mr. Dinsmore, and finally, after about six or eight months, I got a letter from Mr. Dinsmore telling me that I did not have to pay any cabaret tax at all on the private parties. As long as eight months had already been paid, and there was \$700 more I put a claim in for. Nothing was heard of it.

Then I hired an attorney who had just won a case where a Mr. McDonald, an agent, went into the 97th Street Corral and assessed them for \$58,000 taxes.

(Testimony of Marty Wolf Landau.)

Mr. Messer: I object to that.

The Court: We are not interested in that. That may go [12] out. Any dealings you had with the Government will be allowed to go in.

The Witness: Then in 1953 Mr. O'Connor called me again and said he was coming out there, and he come out there, and he had orders to check me.

In the meantime I had stopped paying cabaret tax for a period of seven or eight months in order to try to get a decision from the Government if I was a cabaret or not, because at that time, when Mr. Hammond was going to take my case, he said, "Well, you better hurry up, because a lot of this time on the limitations will run out on this \$58,000, if you want me to handle this case."

Well, I was advised that I didn't have to have an attorney to handle it, that the Government would help me prepare it, which they did. So I went ahead and in 1952—well, prior to that time on the \$4800 refund, a Mr. Smith, who was in the department, checked me for five days out there, and he told my wife and myself and my secretary that I had a legitimate claim, and he was going to recommend a refund of the \$4800.

I waited, four, five, six months and couldn't get anything. Finally I got Mr. Smith on the telephone, and asked him what happened. He said, "My superiors changed my mind for me." He said, "We are in the collection agency business here, and not to give money back to people." [13]

So finally Mr. O'Connor come back in 1953, and

(Testimony of Marty Wolf Landau.)

checked my books for ten days, and when he found out I hadn't paid a cabaret tax, he said, "Didn't you get a letter from the Government?"

I said, "No, I didn't get a letter from the Government."

He said, "Well, somebody slipped up. This copy of the letter is in the files here from 1951."

So that is my case, your Honor.

Mr. Yardum: I think you have answered the question sufficiently, Mr. Landau. There is only one other thing I would like to clear up in connection with the restaurant, the dining room at the Riverside Rancho.

Your Honor please, I want to bring this out because I don't believe the stipulation was entirely clear on this point.

Q. The dining room, where was that located in the building, in this area?

A. There is an outside entrance from the street to get into my dining room.

Q. And is there another entrance there?

A. From the ballroom downstairs. You have to walk upstairs, and it is about 100 or 150 feet away from my entertainment.

Q. Ordinarily, or generally, would a person have to pay an admission to get into this area? [14]

A. If they went in there to this dining room, they would not have to pay an admission, but if they wanted to get into the ballroom, they would have to go into the office to get a ticket to dance,

(Testimony of Marty Wolf Landau.)

and all we had there was dancing, and no entertainment.

Q. Supposing a customer wanted to have dinner at 6:30 p.m., would he have to pay an admission to get into the dining room?

A. No, no admission.

Q. And then could he walk back into the ballroom?

A. No, he would have to go outside and purchase an admission ticket.

Q. After the general box office opened, could they still get into the dining room free of charge?

A. After he paid an admission,—well, we locked the outside after the music would start at 8:30, and they would have to go to the ballroom and purchase a ticket there, and then they could go down to the dining room, but then it was just a dining room.

I might state at this time that I think Mr. O'Connor knows the years that I have dealt with them, and he has really tried to help me on this case, your Honor. He felt that I had a legitimate claim, and he really tried to help me.

Mr. Messer: I object to what Mr. O'Connor did, or what he felt. I don't think that is proper testimony. [15]

The Court: Unfortunately, these things are not decided on the basis of what a particular officer may say. The only time they are brought in is when a penalty is imposed, and somebody delays, and a question of wilful neglect to pay a tax is

(Testimony of Marty Wolf Landau.)

involved. Then, of course, the fact that a person acted even under the advice of a reputable attorney may be considered.

For instance, I recently held in a case where people had failed to pay a tax because counsel had advised them that they were not subject to a tax, that no penalty should be imposed, because there was reasonable excuse for the situation. But we do not have any such situation here.

Now, let us go on.

Q. (By Mr. Yardum): One other thing, Mr. Landau. There is a door, is there not, a five-foot door between the liquor bar and the ballroom?

A. Yes, sir. The fire department wouldn't let me block that whole wall out, so they insisted that I put that five-foot door there for an exit.

Mr. Yardum: I have no further questions.

The Court: Any cross examination?

Cross Examination

Q. (By Mr. Messer): Mr. Landau, I believe you testified that the dining room was open. You didn't specify the hours, as I understand [16] it, that the dining room is open.

A. From 6:00 to 8:30 in the evening.

Q. From 6:00 to 8:30 in the evening. Then when you opened the entrance to the entire enclosure, you closed the public door, the outside door?

A. That is right.

Q. But after a person purchased a ticket of admission, that entitled him to go into the dining

(Testimony of Marty Wolf Landau.)

room area, after he goes into the fenced-in area?

A. Yes.

Q. And that fenced-in portion includes all portions of the Riverside Rancho?

A. The dining room was a separate building.

Q. But they are all enclosed within one enclosure, one fence, one barrier?

A. That's right, sir.

Q. After the patron enters by the main entrance from the street into the entire enclosure, and pays the admission fee, they are entitled to all facilities there, are they not? They may buy whatever you might sell at the milk bar, or the liquor bar, or may enter the dance area, too, isn't that true?

A. That's right, sir.

Q. And no extra admission charge is charged anyone to enter into the building containing the dance area; isn't that [17] true?

Mr. Yardum: I object to that. All that is stipulated to, your Honor.

Mr. Messer: That is stipulated to. However, there are other things that were gone into, and I was just clarifying it.

The Witness: Will you repeat that question, please?

Q. (By Mr. Messer): Once the patron or customer has paid his admission fee at the main entrance to the enclosure,—by the way, what is that admission fee?

A. The admission fee was \$1.20. It has Government tax.

(Testimony of Marty Wolf Landau.)

Q. And once the patron pays that and enters the enclosure, the fenced-in area, that gives him the right to enter any other building within that area without any additional charge, does it not?

A. Yes, it does.

Q. And he may avail himself of all the facilities, and purchase some food, liquor, or anything that is being sold; isn't that right?

A. If they are of age.

The Court: And after 8:30 that is the only way he could get even into the dining room, isn't that true?

The Witness: That is right.

The Court: All right.

Mr. Messer: Nothing further. [18]

The Court: Have you anything further?

Mr. Yardum: I have nothing further, your Honor.

(Witness excused.)

Mr. Yardum: The plaintiff rests.

The Court: All right, Mr. Messer.

Mr. Messer: I would like to call the agent, Mr. O'Connor.

The Court: Do you want to offer your exhibits now?

Mr. Messer: Yes, your Honor.

BERNARD JEFFERSON IRVINE O'CONNOR called as a witness on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

(Testimony of Bernard Jefferson Irvine O'Connor.)

The Clerk: What is your full name?

The Witness: Bernard Jefferson Irvine O'Connor.

The Clerk: How do you spell Irvine?

The Witness: I-r-v-i-n-e.

Mr. Messer: The defendant offers at this time, your Honor, Defendant's Exhibit A, a schedule of receipts.

The Court: It may be received.

(The document referred to was marked Defendant's Exhibit A, and received in evidence.)

Mr. Messer: And as Exhibit B, a certificate of assessments and payments known as Form 899.

The Court: It may be received. [19]

(The document heretofore marked Defendant's Exhibit B, was received in evidence.)

Mr. Messer: And as Exhibit C, claim for abatement in the amount of \$4450.

Mr. Yardum: If the Court please, may I see that? I don't believe that that is stipulated to.

Mr. Messer: Oh, excuse me. This was the original filed by the plaintiff.

Your Honor, we filed them for identification, but it is the original from the plaintiff, and it was in our file.

Mr. Yardum: Yes, that was stipulated to.

The Court: It may be received.

(The document heretofore marked Defendant's Exhibit C, was received in evidence.)

[See pages 72-74.]

(Testimony of Bernard Jefferson Irvine O'Connor.)

Mr. Messer: And as Exhibit D, the returns filed by the plaintiff on the taxes.

The Court: All right.

(The document heretofore marked Defendant's Exhibit D, was received in evidence.)

Direct Examination

Q. (By Mr. Messer): Mr. O'Connor, I believe it was testified that you audited the books of the Riverside Rancho, of the establishment?

A. Yes. [20]

Q. Did you at any time that you audited these books, or at any other time, advise the plaintiff as to how to so construct or remodel his establishment as to prevent the imposition of any cabaret or other tax?

Mr. Yardum: I will object to that, your Honor.

The Witness: No.

The Court: How is that?

Mr. Yardum: I will object to that as being irrelevant and immaterial, your Honor.

The Court: The plaintiff implied that ever since he began everybody told him that, and while he didn't say O'Connor did that, or, he said O'Connor was of the view that he should not pay it, or something like that, with one man being dead, let's get to the last man.

Overruled.

Q. (By Mr. Messer): Will you answer?

A. No.

The Court: The answer is, "No." All right.

(Testimony of Bernard Jefferson Irvine O'Connor.)

Q. (By Mr. Messer): Now, Mr. O'Connor, during the time you were——

The Court: As a matter of fact, isn't it the policy of your department that you are not to advise whether a tax is due or not?

The Witness: You may advise, your Honor, if there is no question. [21]

The Court: If there is no question?

The Witness: If there is a question, it is advisable to confer with your superior until you are of a sure mind, and then make your determination.

The Court: I see. All right.

Q. (By Mr. Messer): During the time that you were auditing these books, did you recommend additional assessments in the amount of \$4450?

A. Yes, I made recommendations for, I think, two additional assessments at two different times.

The Court: Was that one of them, or did they total that?

The Witness: I think there are two different totals, your Honor.

The Court: Two different totals.

Mr. Messer: May I hand these to the judge?

(Handing documents to the court.)

The Witness: That is one total, and I think there was another one. I made recommendations at one time for an assessment of cabaret tax for six or seven months. Those are the months in which payment was made for admissions tax only, and no payment was made for cabaret tax. So I recommended that the cabaret tax for those par-

(Testimony of Bernard Jefferson Irvine O'Connor.)
ticular months be assessed, and I think Mr. Landau paid that.

The Court: All right.

The Witness: Then at another time the question arose as [22] to a credit which was taken, in the amount of some \$5000, or thereabouts, for payment of 20 cents as tax, which under an interpretation as a cabaret wouldn't have been due. In other words, the 20 cents which was paid was 20 cents collected as a tax on free admissions, and that would have been properly due under the interpretation that admissions' tax was due.

However, since the Board and the local office had held that this establishment was subject to the cabaret tax, I made the determination on that 20 cents, to be that 3.2 cents of the 20 cents represented tax, and the balance represented income to the taxpayer, and on that basis I recommended that the claim—that a claim be allowed for that.

During that examination, which covered an extended period of time, I think the net result of that was that there was a recommendation made for additional cabaret taxes amounting to \$4564.16.

Now, I had given the taxpayer credit for the difference between the three and two-thirds cents and 20 cents.

Q. (By Mr. Messer): The net deficiency, then, allowing for credits and all and the admission tax was \$4,450; is that right? A. Yes, \$4,564.16.

The Court: And that was the amount? That

(Testimony of Bernard Jefferson Irvine O'Connor.)
was washed against what he owed for that year
or for the seven months? [23]

The Witness: Yes, that was the reduced amount.

The Court: The reduced amount. All right.

Q. (By Mr. Messer): And is that the amount
shown and concerning which the claim for rebate
was filed?

A. Well, as I say, that amount was assessed.
That is \$4,516 and 4,554.16 was assessed, together
with interest, which amounted to, I think, some
\$5300. The \$880 of that was paid, and the \$4,550
has not been paid, and, therefore, I think that this
claim here is a claim for abatement of—I mean
a refund for \$880, and abatement of \$4,450. That
is probably the outstanding balance at this time.

Mr. Messer: Your Honor, I ask, and I want to
clarify this: This is testimony in connection with
our claim of intervention. That is additional tax
that was assessed against the plaintiff.

The Court: All right.

Mr. Messer: Then, as I understand it, and cor-
rect me if I am wrong as to the amounts——

The Court: Well, I haven't looked at the figures,
but they are identical with the figures you plead
on page 3 of your complaint, isn't that true,—
\$4,450?

Mr. Messer: Yes, your Honor, that is the amount
that has been assessed, but not paid.

The Court: I noticed that. Anything further
from this witness?

Mr. Messer: I think there is nothing further.

The Court: Any questions?

Mr. Yardum: No questions.

The Court: All right, Mr. O'Connor.

(Witness excused.)

The Court: Any other testimony on the part of the Government?

Mr. Messer: No, your Honor, I believe that is all.

The Court: I will declare a short recess, and then I will hear any argument that you have.

I want to say, gentlemen, that I have studied your briefs, and when I read the briefs it occurred to me that possibly a case that was decided last week might help, but it does not do so.

You get these slip decisions, don't you?

Mr. Messer: Yes, your Honor.

The Court: It is the Automobile Club of Michigan, decided April 22, 1957. You know when you read a thing, you just build up a faint impression. Then when I read your briefs, it occurred to me that it might bear on it, but all this does is merely to say that the Commissioner has the right to revoke a ruling and make a tax retroactive.

Mr. Messer: Yes, your Honor.

The Court: And that is not involved here.

Mr. Messer: No.

The Court: The question is whether Congress by subsequently [25] repealing it sort of retroactively gave relief to a taxpayer who had paid it, under what the Congress said was an erroneous interpretation.

Mr. Messer: That is right. We have the case, and I have got the Supreme Court decision.

The Court: Which?

Mr. Messer: The one that you referred to.

The Court: It came down on the 22nd. Do you want to see it?

Mr. Messer: I was waiting to see that.

The Court: This does not bear on this.

Mr. Messer: No, it bears on the other ruling by the Commissioner.

The Court: Yes, it is sustained by a divided court.

Mr. Messer: It sustained it.

The Court: Yes, it sustained it.

Mr. Yardum: If your Honor please, I should like to see it.

The Court: Yes, go ahead. You look at it during the recess. I have to keep up with you boys, you see.

(A short recess.)

The Court: Now, gentlemen, I will hear any argument you desire to present. I have read your briefs, and I think the only question really involved is whether, when the law was changed that was an indication that the law before should [26] have been interpreted the same way. The courts have not agreed. The higher courts have said that meant nothing. Before they changed the law, Congress said that two of the circuits have misinterpreted their meaning, but they didn't get around to changing it.

I am reminded of a statement made in an anti-trust case by Justice Reed last year. It was in *United States vs. McKesson-Robbins*. It was an

antitrust case, and it cited some of the debates in order to sustain the lower court, which had dismissed the action on the ground that it didn't apply to a particular situation. While Justice Reed referred to the colloquy between Senator Sparkman and Senator Humphrey as to the meaning of the amendment to the McGuire Act, he said that legislative history and legislative statements do not help when the language is plain and not ambiguous.

I will hear what you have to add to your argument, gentlemen.

Mr. Yardum: If the Court please, I have very little to add. In fact, I don't think that I can add anything to that. I am sure, from listening to your Honor talk, that you have a grasp of what our problem is.

The Court: I am glad I had the time, gentlemen, because Mr. McHale knows how busy I have been, but I did have the time, and I studied your memos. Your final memo did not [27] come in until this morning, but I studied that one, too, and I looked at the exhibits and familiarized myself with what the case is all about.

Mr. Yardum: However, we only feel that the decision, the District Court decision in *Geer v. Birmingham* was a magnificent decision, and we feel that decision should be followed, and that when Congress reworded the law, or added the words, that they were merely declaring their intent and purpose all the time. And I believe that our authorities go to that purpose.

The Court: All right, Mr. Messer.

Mr. Messer: Your Honor, we feel, as you have said, that really this case revolves actually about a question of law entirely, and had it not been for our complaint in intervention, I believe so far as we are concerned, it could have been submitted on the briefs and the law involved, for the reason that the determinative date in this case, I believe, is November 1, 1951, when the statute was amended.

As we have outlined in our brief, we feel that since this refund for taxes was for the period prior to November 1, 1951, that is the case.

The Circuit Court in Birmingham versus Geer reversed the case, or Geer versus Birmingham, which is really a very fine opinion. I have read it. It is about 45 pages long, and it is very helpful, and is a very learned and [28] exhaustive opinion. However, the Circuit Court felt that it was not a proper interpretation of the statute as it then read.

So Congress, to prevent a broad construction of the statute insofar as ballrooms and dance halls were concerned, amended the statute, but in that amendment it expressly provided that the amendment was only to be effective from November 1, 1951.

I think the Peony Park case, in which nine cases were consolidated for purposes of appeal, held that that statute is prospective only,—the amendment is prospective only, and is not retroactive. But the Birmingham versus Geer and Avalon Amusement Corporation cases properly interpreted the law as it existed prior to the amendment, and that the new

amendment would apply only to situations subsequent to November 1, 1951.

We feel that that is the determinative issue here, that it is one of law, and the interpretation of that amendment, whether it applies to all of these so-called ballrooms and dance halls going clear back, if they are within the statute of limitations where they can all now come in and file suits for refund because of that amendment, and we don't feel that is possible under the amendment.

The Court: Of course, following this decision here in the Michigan Automobile Club case, I presume that if the Commissioner has a right to make a statute retroactive, of [29] course, the Congress also has that power. But before you make a statute retroactive, it must be clear that it was intended so to apply it. The very fact that Congress, despite its previous criticism of the two Circuit Court decisions which had arisen under it, found it necessary to amend the law, indicates that they felt regardless of the difference between them and the courts, ultimately the courts' opinion would prevail.

Mr. Messer: I don't believe, your Honor, that that is what the Congress intended, and what the cases have decided on that amendment since it was passed, but that it provides in the statute itself it shall be effective only from a certain date. I think that Congress intended by the amendment to mean that it is a clarification of the existing law.

The Court: Is that specific language in the new statute?

Mr. Messer: Yes, your Honor, it is very specific, and the Peony Park case took that very question up and decided that it was a prospective statute only.

The Court: I know the decision, but I am talking about the statute.

Mr. Messer: Yes. The statute is Section 404 of the Revenue Act of 1951, amending Section 1700(e) (1).

The Court: Is that on page 4 of your memorandum?

Mr. Messer: Yes, it is on page 4. [30]

The Court: "The amendment made by subsection (a) shall be applicable only with respect to periods after 10 antemeridian on the first day of the first month which begins more than ten days after the date of the enactment of this Act."

Is that what you refer to?

Mr. Messer: Yes, your Honor. That was the very section that was up before the court in the Peony Park case, which had nine different actions, all similar, consolidated for purposes of appeal.

The court was very specific concerning that, because the same argument was made there as made here, that it was simply a clarification of the existing law, and the court said, no, ordinarily the rule is that a statute and an amendment thereto would be considered prospective only, and in this case pointed out that the statute itself specified that it shall apply only from a definite date, namely, November 1, 1951, and that the cases before it then, which were similar to this case, could not recover

any of the taxes paid prior to November 1, 1951. That the law at that time was specific as to the situation prevailing prior to the amendment, and that the amendment now is new law exempting, definitely exempting certain types of establishment from the application of the cabaret tax, and that it would have been unnecessary for Congress to have placed that section in the amendment if [31] they wanted it to apply to all cases arising before November 1, 1951.

The Court: As I said before, Congress has that power, but ordinarily you do not give retroactive effect even to tax statutes, unless it is quite apparent that it was so intended.

Mr. Messer: That is right, your Honor. I believe, if I remember correctly on that Michigan Automobile Club case, they asked for a ruling that they be a tax exempt organization, and submitted certain facts, and if my memory serves me correctly, the Commissioner did rule that they were a tax exempt organization, but later——

The Court: Changed it.

Mr. Messer: ——changed it, I believe, because they felt that certain facts submitted may not have been as represented at the time of the ruling, and made it retroactive. However, it is my understanding that the Department or that the Internal Revenue Service, when they issue a ruling saying, for example, that a place is not subject to a cabaret tax, or to a manufacturer's excise tax, as we had here in another court a few weeks ago, and they stated that no tax would be collected for the period

within which or during which the ruling was in effect, but they do not go back. I understand that is the practice, and they make a ruling that they will not collect a tax while the ruling is in effect. Only after [32] it is revoked will they start to collect a tax again, which is a very fair and equitable view to take on it.

I think we would have quite a situation if that were not true, because rulings are sometimes made rather hurriedly, I understand, and they are——

The Court: A ruling has a different basis, and they are given the effect of law, because Congress has charged the Treasury Department with the duty to make rulings, and they carry great weight with the court.

Mr. Messer: That is right. I am not speaking now of public rulings which come down, but I am speaking now of private rulings.

The Court: All right.

Mr. Messer: And when they will not collect it during the time the ruling is in effect, the Service will not go back and make it retroactive and collect a tax if they revoke that ruling, because they find sometimes that they were wrong in that original ruling, and many times that has happened. And what the courts have found is that the Government is entitled to the correct interpretation of the law, and what the law is as to the taxing statute, that the courts have that power, and if the court determines it is taxable, that the ruling of the Government does not prevail. But the Commissioner is not bound by any ruling at all in that practice of not

collecting the tax while the ruling is in [33] effect. That is my understanding, and I have seen language to that effect.

We feel, your Honor, that this case, which is an action for refund of cabaret taxes paid prior to November 1, 1951, is barred by the cases which have decided as to what the law was at that time, and all the Circuit Court cases in this field have held for the Government. None of them have been on the side of the taxpayer on this question.

Now, the *Birmingham v. Geer* case is the outstanding case on this, and, as I said, that is a very exhaustive opinion, and then Congress saw fit, because of the situation that existed at that time to amend the Act. And from my reading on the subject, the field was rather individual as to the rulings under the Act, and the enforcement of this cabaret tax, but in the appeal of the Peony Park case, all nine had appealed, and they were all reversed, and they started collecting taxes again. The actions were broad, and the court determined the amendment was prospective only, and applied to situations since November 1, 1951, and it was not retroactive because the statute itself so provides, even if you disregard the general rule that a statute is prospective in application rather than retroactive.

So, your Honor, we feel the Government is entitled to a judgment in this case in the amount of \$4,450, plus interest as provided by law. [34]

The Court: All right.

Mr. Yardum: If the court please, I would like to make several comments.

Firstly, counsel has just mentioned that there have been many circuits, or, it seems to me that he said many circuits, or that there have been no circuits that have sustained the taxpayer in a case like this.

My recollection is that there have been only one or two circuits that have passed on this, the Avalon case and the Geer case. The Peony Park case was in the Eighth Circuit, I believe, where the Birmingham v. Geer decision was laid down, and it would seem untenable to me that one circuit court in this country could decide what Congress meant and settle the question.

Now, on the point about the Act becoming effective on November 1, 1951, I think that that point is handled very well in the Geer v. Birmingham decision, and I would refer your Honor to that decision for that point, as well as all of the others. The judge in that case stated our case better than I could ever say it.

I believe that is all, your Honor.

The Court: The matter will stand submitted. I will go over the matter a little more carefully before deciding it.

Mr. Messer: I did not mean to mislead the court, that there were a number of circuits. [35]

The Court: There are two circuits.

Mr. Messer: In my brief I said there were only two courts of appeal that had passed on it.

The Court: Yes, two circuits decided it, one under the old law, and one under the new law.

Mr. Messer: Under the new law, yes.

The Court: Yes, I understand the matter.

The matter will stand submitted, and you will hear from the clerk in a few days.

Mr. Messer: Thank you, your Honor.

Mr. Yardum: Thank you, your Honor. [36]

[Endorsed]: Filed Aug. 20, 1957.

PLAINTIFF'S EXHIBIT No. 1

[Title of District Court and Cause.]

STIPULATION OF FACTS

It is hereby stipulated and agreed by and between the parties hereto through their respective counsel, without prejudice to the rights of any party herein to introduce additional evidence not inconsistent herewith, and without prejudice to their right to object to the materiality or relevancy of any of the facts agreed to, during the periods involved in this action, as follows:

I.

The plaintiff in this action was the operator of an establishment known as "Riverside Rancho" which is located at 3213 Riverside Drive, Los Angeles, California.

II.

The physical layout of the Riverside Rancho was as follows:

1. The entire area within which was located the establishment herein involved was bounded on all sides by a wooden fence approximately 7 feet high.

2. There was an entrance into this area. Said entrance was on Riverside Drive and was approximately 6 feet wide. A public sidewalk was located along the side where this entrance was placed. Hereafter, said entrance will be referred to as the "main entrance."

3. Immediately outside the gate to the main entrance was located a box office.

4. Upon entering the premises, there was an uncovered patio area.

5. To the right of the main entrance and in the patio area there was a milk bar where refreshments were sold to anyone entering the fenced-in area.

6. Upon crossing the patio, and straight ahead from the main entrance, there was a building within which was a dance area of 6,000 to 7,000 square feet. This dance area was approximately 35 feet from the milk bar.

7. Within the same building as the dance area, there was a check room and a bar where liquor and beer were sold and served. This bar was equipped with about 30 stools and about 8 long benches which seated about 12 to 14 persons each.

8. The liquor bar and the dance area are separated by a solid wall except for an opening approximately 5 feet wide between the dance area and the liquor bar. This opening was never closed by order of the City of Los Angeles Fire Department.

9. Patrons were permitted to pass freely between the dance area and liquor bar through the above-

mentioned opening in the wall, except that no refreshments were allowed to be taken into the dance area.

10. Within the fenced area there was also located a separate building on the second floor of which there was an area of approximately 400 square feet referred to as the dining room. This building was separate and apart from the dance area. The building of the dance area was approximately 100 feet from the building within which was located the dining room. Food was served in said dining room during the hours set forth in paragraph VII below.

III.

Within the area enclosed by the wooden fence there was approximately one acre of ground. The physical layout of the establishment will more clearly appear from a sketch of the layout and from photographs thereof which are hereinafter referred to. Said sketch and photographs are made a part of this stipulation.

IV.

From April 1, 1948 to June 20, 1950, a general admission charge of \$1.20 was charged to any person desiring to enter into the area enclosed by the wooden fence.

V.

After June 20, 1950, the general admission charge was \$1.00, except on Friday and Saturday evenings when \$1.20 was charged. On Wednesday and Sunday nights, ladies were admitted for \$.20.

VI.

The Riverside Rancho was operated only during

the hours from 8:00 or 9:00 P.M. to 12:00 or 1:00 A.M. as the occasion warranted. On Wednesdays and Sundays the establishment opened at 8:00 P.M. and closed at midnight. On Saturdays the hours were from about 8:00 P.M. to 1:00 or 1:30 A.M.

VII.

The dining room was operated on a different time schedule from the balance of the establishment. It opened daily at 6:30 P.M. There was a separate entrance (as distinguished from the "main entrance" referred to above), which remained open until about 8:00 P.M. There was no admission charge for those persons entering the dining room through the dining room entrance, which entrance was closed at about 8:00 P.M. and anyone who wished thereafter to enter the dining room by this entrance first had to pay the same admission charge as those who entered the enclosed area by way of the main entrance.

VIII.

Except for the dining room customers who entered said dining room during the hours set forth above, no one could enter the enclosed area, including the patio, dance area, milk bar and hot dog stand, liquor bar, and dining room without first paying the admission charge.

IX.

There were no passout privileges. Anyone leaving the enclosed area and thereafter desiring to return were required to pay an additional admission charge.

X.

Once within the enclosed fenced area, patrons were permitted to move freely from one room or building to another or to any other part of the enclosed fenced area without additional charge of any kind, except that no refreshments of any kind were permitted to be taken into the dance area, and this was enforced by the posting of special private policemen at each of the entrances into the dance area.

XI.

No refreshments are sold or allowed (as stated above) in the dance area, nor was any service of any kind provided therein. There were benches along the walls of the dance area, but there were no tables or chairs in this area.

XII.

The Riverside Rancho employed a western dance orchestra to supply the music for dancing in the dance area. The orchestra took approximately 10 minutes intermissions at approximately one hour intervals. Except for said orchestra, no dinner dance music, floor shows or other entertainment was furnished within the fenced area, either indoors or outdoors.

XIII.

It was not possible for the customers in the dining room, while in the dining room, to see or hear the music being played by the orchestra since the building housing the orchestra and the building housing the dining room were separated by approx-

imately 100 feet as stated above. There was no dancing in the dining room, but a bar was located therein.

XIV.

The patrons in the liquor bar could not see the orchestra while said patrons remained in said liquor bar area. Although the music being played by the orchestra in the dance area did drift through the 5 foot opening in the partition between the dance area and the liquor bar area, the patrons in the liquor bar area were not able to hear intelligible strains of music being played by the orchestra. There was no dancing allowed in the liquor bar area. The statements in this paragraph apply to the milk bar also, i.e., music could be heard but it was unintelligible, and no dancing was allowed in the milk bar area.

XV.

The Riverside Rancho was licensed by the City of Los Angeles licensing department. On the licenses issued, the Riverside Rancho was designated as "dance hall."

The Los Angeles Police Department also had issued licenses to said Riverside Rancho and had designated said establishment thereon as public dance hall cafe.

The Board of Fire Commissioners of the City of Los Angeles had issued its Fire Permits to said Riverside Rancho and had designated said Riverside Rancho thereon as "Dancing" and "Cafe-Ballroom."

The dining room was separately licensed as a restaurant by the City of Los Angeles.

XVI.

The prices charged for drinks at the bar were as follows: Eastern beer, 40c; Western beer, 30c; average of other drinks, 60c. The following refreshments were sold at the milk bar with the following prices: hot dogs at 20c; coffee at 10c; soda pop at 10c.

XVII.

It is stipulated that the following exhibits may be offered on behalf of the plaintiff:

1. Exhibit A—Claim for refund dated January 26, 1954.

2. Exhibit B—Sketch of layout of the Riverside Rancho premises.

3. Exhibit C—Photographs marked on reverse side as follows:

1800-149; 776-2189; 776-2190; 776-2192; 1771-30; 1800-148; 776-2195; 776-2194; 776-2193; 776-2191.

It is stipulated that the following exhibits may be offered on behalf of the defendant:

1. Exhibit 1—Schedule of receipts from admissions and refreshments and food sales by plaintiff during the periods involved.

2. Exhibit 2—Forms 899, Certificate of Assessments and Payments, for the periods involved.

Dated: December 13, 1956.

LAUGHLIN E. WATERS,
United States Attorney,
EDWARD R. McHALE,
Assistant United States
Attorney,
Chief, Tax Division,
JOHN G. MESSER,
Assistant United States
Attorney,

/s/ JOHN G. MESSER,
Attorneys for Defendant.

ENGEL & YARDUM,
/s/ By LE VONE A. YARDUM,
Attorneys for Plaintiff.

Acknowledgment of Service Attached.

[Endorsed]: Filed Dec. 14, 1956.

PLAINTIFF'S EXHIBIT No. 4

U. S. Treasury Department
Internal Revenue Service
District Director
Los Angeles 12, Calif.

March 27, 1956

In Reply Refer to: Code 1230-796

Marty W. Landau
DBA Riverside Rancho
3213 Riverside Drive
Los Angeles 27, California

Claim for Refund of \$19,590.93, Taxable Period:
12/1/49 to 11/30/51.

In accordance with the provisions of Section 3772 (a) (2) of the Internal Revenue Code, this notice of disallowance in full of your claim or claims is hereby given by registered mail.

By direction of the Commissioner:

Very truly yours,

District Director.

Registered Mail 154742

ry

CLAIM

To Be Filed With the Collector Where Assessment
Was Made or Tax Paid

Collector's Stamp: 95; Received Jan. 26, 1954;
Director Int. Rev., Los Angeles.

* * * * *

✓ Refund of Taxes Illegally, Erroneously, or
Excessively Collected.

* * * * *

Notice—Under Reorganization Plan No. 1 of
1952, Reference to Collector Now Relates to Di-
rector of Internal Revenue.

Name of taxpayer or purchaser of stamps: Marty
W. Landau DBA Riverside Rancho.

Street address: 3213 Riverside Drive.

City, postal zone number, and state: Los Angeles
27, California.

1. District in which return (if any) was filed:
Los Angeles, California.

2. Period (if for tax reported on annual basis, prepare separate form for each taxable year) from Dec. 1949, to November, 1951.

3. Kind of tax: Cabaret.

4. Amount of Assessment, \$19,590.93; dates of payment, Various.

5. Date stamps were purchased from the Government:

6. Amount to be refunded: \$19,590/93.

7. Amount to be abated (not applicable to income, estate, or gift taxes)

The claimant believes that this claim should be allowed for the following reasons:

We hereby apply for refund of cabaret taxes in the amount of \$19,590.93, plus interest thereon, inasmuch as we were not liable for the payment of this cabaret tax, and said tax was erroneously paid over to the Government.

Attached hereto is a record of taxes paid, interest to be added.

I declare under the penalties of perjury that this claim (including any accompanying schedules and statements) has been examined by me and to the best of my knowledge and belief is true and correct.

Dated: January 26, 1954.

/s/ MARTY W. LANDAU.

[Letterhead of Riverside Rancho]

Period for which tax was paid, and amount of tax paid.

December, 1949	\$ 1,067.58
January, 1950	1,020.08
February, 1950	1,315.29
March, 1950	1,251.84*
April, 1950	1,292.89*
May, 1950	950.49*
June, 1950	966.81*
July, 1950	935.09*
December, 1950	952.62
January, 1951	1,045.57
February, 1951	1,112.23
March, 1951	1,075.21
June, 1951	1,586.99
July, 1951	1,321.25
August, 1951	1,322.95
September, 1951	1,096.89
October, 1951	1,277.15

Total\$19,590.93

*These five items have a penciled notation "No."

Received: 95; Jan. 26, 1954; Director of Int. Rev., Los Angeles.

POWER OF ATTORNEY

I/we, the undersigned, Marty W. Landau DBA Riverside Rancho, of 3213 Riverside Drive, Los Angeles 27, California. Hereby make, constitute and

appoint Charles P. Carter and/or Oliver R. Mills of 8533 Sunset Blvd., Hollywood 46, California, enrolled to practice before the Treasury Department on Carter—5-14-52, Mills—2-13-52, my/our true and lawful representative(s), for me/us and in my/our name, place and stead, to act for me/us, and to appear for, and represent me/us, before the Treasury Department of the United States Government, or agent or employee thereof, in any matter involving my/our federal taxes, for any and all years, giving and granting to said representative(s) full power and authority to do and perform any and every act and thing relative to my/our tax liability, as fully and to all intents and purposes as I/we might do if personally present, including but not limited to the power:

(1) to receive but not to endorse and collect checks in settlement of any refund;

(2) to delegate authority, associate or to substitute another agent(s);

(3) to execute consents agreeing to a later determination and assessment of taxes than is provided by the Statute of Limitations;

(4) to execute closing agreements relative to tax liability; and,

(5) it is further directed that copies of all correspondence, reports, documents, etc., in connection with the above matters be sent to said representative(s).

All powers of attorney involving federal taxes,

heretofore filed or executed by the undersigned, are hereby revoked, and all prior representatives have been notified of such revocation(s).

Dated this 16th day of April, 1955.

/s/ MARTY W. LANDAU.

County of Los Angeles,
State of California—ss.

Subscribed and sworn to before me this 16th day of April, 1955.

[Seal] /s/ R. M. SANDERS.

Received: Apr. 20, 1955; Appellate Division, Los Angeles Office.

STATEMENT RELATIVE TO FEES TO BE
FILED WITH POWER OF ATTORNEY

Los Angeles, California,
April 20, 1955.

This is to certify that I have not entered into a contingent or partially contingent fee agreement for the representation before the Department of Marty W. Landau in the matter of Federal Taxes under the terms of a power of attorney filed with the Treasury Department on April 20, 1955 and (in case a contingent or partially contingent fee agreement has been made) that a report of such fee agreement (has) (has not) been made to the Committee on Practice.

/s/ OLIVER R. MILLS.

Received: Apr. 20, 1955.

DEFENDANT'S EXHIBIT C

U. S. Treasury Department
Internal Revenue Service
District Director
Los Angeles 12, Calif.

March 27, 1956

In Reply Refer to: Code 1230-796

Marty W. Landau
DBA Riverside Rancho
3213 Riverside Drive
Los Angeles 27, California

Claim for Abatement \$4,450.00
Claim for Refund of \$880.49
Taxable Period: 10/50 to 9/53

In accordance with the provisions of Section 3772
(a) (2) of the Internal Revenue Code, this notice of
disallowance in full of your claim or claims is
hereby given by registered mail.

By direction of the Commissioner:

Very truly yours,

District Director.

Registered Mail 154741

ry

CLAIM

To Be Filed With the Collector Where Assessment
Was Made or Tax Paid

Collector's Stamp; Received: 95; Sep. 23, 1955;
Director Int. Rev., Los Angeles; Teller #9.

The Collector will indicate in the block below the kind of claim filed, and fill in, where required, the certificate on the back of this form.

XX Refund of Taxes Illegally, Erroneously, or Excessively Collected.

Refund of Amount Paid for Stamps Unused, or Used in Error or Excess.

XX Abatement of Tax Assessed (not applicable to estate, gift, or income taxes).

Name of taxpayer or purchaser of stamps: Marty W. Landau DBA Riverside Rancho.

Street address: 3213 Riverside Drive.

City, postal zone number, and State: Los Angeles 27, California.

1. District in which return (if any) was filed: 6th California.

2. Period (if for tax reported on annual basis, prepare separate form for each taxable year) from Oct., 1950, to Oct. 1953.

3. Kind of tax: Cabaret (Additional).

4. Amount of assessment, \$5330.49; dates of payment: \$880.49 paid during Jan. thru Aug. 1955.

5. Date stamps were purchased from the Government:

6. Amount to be refunded: \$880.49.

7. Amount to be abated (not applicable to income, estate, or gift taxes): \$4450.00.

The claimant believes that this claim should be allowed for the following reasons:

Assessment was erroneously made. Amount paid on account should be refunded to taxpayer and balance of assessment abated. Taxpayer liable for Admissions Tax only, which has been paid. Taxpayer filed claim for refund of \$19,590.93 (form #843) on or about February 2, 1954, which is now in the Appellate Division for consideration. Said claim is assigned to F. N. Gilbert, who has been furnished with statement of facts, and this claim is based on same issue. Taxpayer contends that at no time was he liable for Cabaret Tax under section 1700 (e) of the Code, although for a limited period of time he did pay it, upon the advice of his accountant and others. Cabaret tax which he paid, was not collected from customers, but absorbed by taxpayer.

I declare under the penalties of perjury that this claim (including any accompanying schedules and statements) has been examined by me and to the best of my knowledge and belief is true and correct.

Dated: Sept. 9, 1955.

/s/ MARTY W. LANDAU,
DBA Riverside Rancho.

[Endorsed]: No. 15696. United States Court of Appeals for the Ninth Circuit. Marty W. Landau, doing business as Riverside Rancho, Appellant, vs. Robert A. Riddell, individually and as District Director of Internal Revenue for the Sixth District of California, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed: September 4, 1957.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit

No. 15696

MARTY W. LANDAU, doing business as River-
side Rancho, Appellant,

vs.

ROBERT A. RIDDELL, individually and as Dis-
trict Director of Internal Revenue for the
Sixth District of the State of California,
Appellee.

STATEMENT OF POINTS RELIED ON

To the Honorable United States Court of Ap-
peals for the Ninth Circuit:

The appellant above named hereby indicates and

states the points upon which he intends to rely in the foregoing and above entitled appeal to be as follows:

(1) That the taxpayer was not the proprietor or the owner of an establishment coming within the term "roof garden, cabaret, or similar place" as such term is used in Section 1700(e) of the Internal Revenue Code (1939) as amended.

(2) That under the regulations of the Commission of Internal Revenue issued pursuant to the Revenue Act of 1941, which amended Section 1700 (e), the Commissioner interpreted said section as excluding dance halls, and ballrooms similar to that conducted by the Appellant from the provisions of said section.

(3) That Congress, speaking through the members of the House Ways and Means Committee and the Senate Finance Committee, on the Revenue Act of 1951, declared that it was its intent and purpose in the passage of Section 1700 (e) of the Revenue Code of 1939, as amended in 1941, that dance halls and ballrooms similar to that conducted by the taxpayer were not included within the meaning of the term "roof garden, cabaret, or similar place".

(4) That the Commissioner has not published in his Internal Revenue Bulletins or his Cumulative Bulletins any change in the regulations promulgated by him under the provisions of the Internal Revenue Act of 1941, setting forth his interpretation of Section 1700 (e) of the Internal Revenue

Code of 1939, as amended by the Revenue Act of 1941.

(5) That the action of the Congress in relation to said Section 1700 (e) was not a change or amendment of the law as set forth in said section, but was merely a declaration and clarification of the existing law.

Dated: October 3, 1957.

/s/ CLINTON F. SECCOMBE.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed Oct. 8, 1957. Paul P. O'Brien, Clerk.

[Title of Court of Appeals and Cause.]

SUPPLEMENT TO STATEMENT OF POINTS RELIED ON

To the Honorable United States Court of Appeals for the Ninth Circuit:

The Appellant above named, having heretofore indicated the points upon which he intends to rely in the foregoing and above entitled Appeal, hereby supplements said Statement of Points Relied On, by adding thereto an additional Point (6), as follows:

(6) That the cabaret tax was not imposed as a direct tax on the proprietor or owner of a cabaret, roof garden, or similar place. Under the provisions of the Internal Revenue Code he was charged with

the duty of returning all payments of such taxes received by him. When the Commissioner of Internal Revenue, or his delegate, by issuing a letter in January, 1951, informing all Collectors of Internal Revenue of the change in his interpretation of Section 1700 (e), Internal Revenue Code (1939), as amended, declared that such ruling should be applied retroactively, he penalized all owners and proprietors of dance halls, and ballrooms, similar to that operated by the taxpayer, (appellant), who had failed to collect a cabaret tax from their patrons, because of their reliance upon the Commissioner's long standing interpretation of the intent and purpose of Congress, under which he had declared that no cabaret tax was due from them.

Dated October 10, 1957.

/s/CLINTON F. SECCOMBE.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed Oct. 11, 1957. Paul P. O'Brien, Clerk.

No. 15696

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

MARTY W. LANDAU, doing business as RIVERSIDE
RANCHO,

Appellant,

vs.

ROBERT A. RIDDELL, Individually and as District Director
of Internal Revenue for the Sixth District of California,

Appellee.

On Appeal From the Judgment of the United States District
Court for the Southern District of California.

BRIEF FOR THE APPELLEE.

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FILED

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Appellant,

vs.

ROBERT A. RIDDELL, Individually and as District Director
of Internal Revenue for the Sixth District of Cali-
fornia,

Appellee.

On Appeal From the Judgment of the United States District
Court for the Southern District of California.

BRIEF FOR THE APPELLEE.

Opinion Below.

The decision of the District Court [R. 17-25] is not
officially reported.

Jurisdiction.

This appeal involves federal excise taxes for taxable
period December 1, 1949, to November 1, 1951. During
that period taxpayer paid \$19,590.93 in excise (cabaret)
taxes. [R. 21.] Claim for refund was filed on January
25, 1954, and was rejected on March 15, 1956. [R. 21.]
Within the time provided in Section 6532 of the Internal

Revenue Code of 1954 and on August 21, 1956, the taxpayer brought an action in the District Court for recovery of the taxes paid. [R. 3-8.] In 1954 the Commissioner of Internal Revenue had assessed additional excise (cabaret) taxes for the period October, 1950, through October, 1951, which with interest amounted to \$5,330.49. [R. 21-22.] Taxpayer paid \$880.49 in payments in 1955 reducing the additional assessment to \$4,450. [R. 22.] The United States of America by leave of court filed a complaint in intervention against taxpayer to recover the \$4,450 in said taxes. [R. 12-15.] Jurisdiction was conferred on the District Court by 28 U. S. C., Section 1346. The judgment was entered on May 16, 1957. [R. 25.] Within 60 days and on July 15, 1957, a notice of appeal was filed. [R. 26.] Jurisdiction is conferred on this Court by 28 U. S. C., Section 1291.

Questions Presented.

1. Whether the District Court erred in holding that the provisions of Section 404(a) of the Revenue Act of 1951 (applicable only with respect to taxable periods commencing on November 1, 1951, by the provisions of Section 404(b) of the 1951 Act), amending Section 1700(e) of the Internal Revenue Code of 1939, were not to be retroactively applied to the taxable period extending from December, 1949, to and including October, 1951, involved herein.

2. Whether taxpayer's establishment was a cabaret, roof garden, or similar place subject to the tax imposed by Section 1700(e) of the Internal Revenue Code of 1939 even if Section 404(a) of the Revenue Act of 1951 were to be retroactively applied to the taxable period in question.

Statutes and Other Authorities Involved.

The statutes and other authorities involved are set forth in the Appendix, *infra*.

Statement.

Since 1948 taxpayer has operated the Riverside Rancho, an establishment providing dancing privileges, food, other refreshments, and checkroom services. [R. 21.] The establishment consisted of a fenced-in area approximately one acre in size containing two large buildings about 100 feet apart. [R. 59-61.] One building contained a 7,000 square foot dance area and a liquor bar containing about 30 bar stools. Access from the dance area into the liquor bar was via a five-foot opening which was never closed. [R. 60.] Patrons could pass freely between the bar and the dance area. [R. 60-61.] A milk bar in an uncovered patio was located about 35 feet from the dance area. [R. 60.] The other large building had a dining room of approximately 400 square feet on the second floor. [R. 61.] Separate access to the dining room was cut off at 8:00 p.m. [R. 62.] Thereafter all patrons including those then in the dining room had to pay the admission charge of \$1.20.¹ [R. 61-62.] Once within the enclosed area patrons had access to any part or facilities therein without additional charge. No refreshments were allowed in the dance area. It was not possible to hear intelligible strains of music in the liquor bar, the milk bar or in the dining room. [R. 63-64.] The prices charged apparently were equivalent to the normal retail prices. [R. 65.]

During the period December 1, 1949, through November 1, 1951, taxpayer filed excise (cabaret) tax returns

¹A minor change in the admission rate was made in June of 1950 but is not relevant herein. [R. 61.]

and paid \$19,590.93 in cabaret taxes. On January 25, 1954, taxpayer filed a claim for refund which was rejected on March 15, 1956. In 1954 additional cabaret taxes were assessed against taxpayer for October, 1950, through October, 1951, totaling, with interest, \$5,330.49. In 1955, taxpayer made payments amounting to \$880.49 against the additional assessment, resulting in a balance owing of \$4,450.00. [R. 21-22.] In 1956 the United States of America filed a complaint in intervention against taxpayer to recover the \$4,450.00 plus penalties and interest. [R. 12-15.]

The District Court held that taxpayer was subject to the excise (cabaret) tax imposed by Section 1700(e) of the Internal Revenue Code of 1939 for the period December 1, 1949, to November 1, 1951. The District Court also held that the 1951 amendment to Section 1700(e), specifically exempting from the cabaret tax those ball-rooms, dance halls or other similar places in which the serving and selling of food and refreshments is incidental, is applicable only with respect to periods commencing November 1, 1951. [R. 24.] The District Court entered judgment dismissing the taxpayer's complaint and awarding judgment to the United States of America under its complaint in intervention. [R. 25.] Taxpayer appealed from both judgments. [R. 26.]

Summary of Argument.

During the period in question, December 1, 1949, to November 1, 1951, Section 1700(e) of the Internal Revenue Code of 1939 imposed the so-called cabaret tax upon establishments falling within the classification "roof garden, cabaret or other similar place." The section defined this phrase to include any room in any restaurant, hall, or other public place where music and dancing

privileges are afforded patrons in connection with the serving or sale of food, refreshments, or merchandise. It was established by case law that ballrooms and other similar establishments fell within the meaning and application of Section 1700(e) even though the sale of food or refreshments was merely incidental. Under the applicable law, it clearly is subject to the cabaret tax.

In 1951 Congress amended the section to avoid the court constructions by excluding from the tax those ballrooms or other similar places in which the serving of food, refreshments, or merchandise is "merely incidental." This amendment, by its terms, was expressly made applicable only with respect to taxable periods beginning after November 1, 1951.

However, taxpayer contends that the 1951 amendment was merely a clarifying amendment declaratory of existing law and should be given retroactive effect as part of the section applicable to the period in question. The District Court correctly rejected this contention on the basis of the express prospective effective date in the amendment and also on the basis that an amendatory statute will not be given retroactive effect unless its terms so provide. The District Court is supported by the legislative history which indicates that Congress intended to and did effectuate a change. The District Court, applying the section as it stood prior to the 1951 amendments, dismissed taxpayer's complaint and awarded judgment to the United States of America under its complaint in intervention.

Furthermore, even if the amendment were to be retroactively applied, taxpayer's establishment is not a ballroom or other similar place in which the sale of food, refreshments, or merchandise is merely incidental and therefore it remains subject to the tax.

ARGUMENT.

I.

The Provisions of Section 404(a) of the Revenue Act of 1951, Amending Section 1700(e) of the Internal Revenue Code of 1939, Do Not Apply to the Taxable Period Involved in This Case.

The principal question to be decided is whether Section 404(a) of the Revenue Act of 1951 (Appendix, *infra*), amending Section 1700(e)(1) of the Internal Revenue Code of 1939 (Appendix, *infra*), is to be applied retroactively, so as to relieve taxpayer of his liability for so-called cabaret taxes assessed for the period December 1, 1949, to November 1, 1951. As the Director contends and the District Court held, the 1951 amendment is applicable only with respect to periods commencing November 1, 1951, and the taxpayer's establishment is subject to the cabaret tax imposed by Section 1700(e)(1).

The broad problem is essentially one of definition: Is a particular establishment a roof garden, cabaret or similar place within the meaning of Section 1700(e)(1) or is it not? Taxpayer contends that any ballroom is not a "roof garden, cabaret, or similar place" within the meaning of this section and then assumes the issue by terming his establishment a "ballroom." (Br. 5-11.) Prior to the 1951 amendment, ballrooms and similar establishments were taxable as cabarets even though the service or sale of food, refreshments or merchandise was merely incidental. *Avalon Amusement Corp. v. United States*, 165 F. 2d 653 (C. A. 7th); *Birmingham v. Geer*, 185 F. 2d 82 (C. A. 8th), certiorari denied, 340 U. S. 951. To avoid this broad construction, the 1951 amendment exempted from the cabaret tax bona fide dance halls, ballrooms and other similar places where the serving or selling

of food, refreshments, or merchandise is merely incidental to the music and dancing privileges furnished, unless the conduct of the place is such as to bring it within the normal concept of a roof garden, cabaret, or similar place. However, unless this 1951 amendment is effective during the period in question, even if taxpayer's Riverside Rancho could be found to be a ballroom in which the sale of refreshments was incidental, it would be taxable under Section 1700(e) as it stood prior to the 1951 amendment.

Section 1700(e) of the Internal Revenue Code, as amended, imposes an excise tax of 20 per cent (commonly referred to as the cabaret tax) on amounts paid for admission, refreshment, service, or a public performance for profit. The term "roof garden, cabaret, or other similar place" is defined by Section 1700(e) to include "any room in any hotel, restaurant, hall, or other public place where music and dancing privileges or any other entertainment, except instrumental or mechanical music alone, are afforded the patrons in connection with the serving or selling of food, refreshment, or merchandise." Section 1700(e) also provides that a performance shall be regarded as being furnished for profit even though the charge made for admission, refreshment, service, or merchandise did not increase by reason of the furnishing of such performance. Substantially the same definition is given to the above terms by Section 101.14, Treasury Regulations 43 (Appendix, *infra*).

On January 28, 1948, The United States Court of Appeals for the Seventh Circuit decided the case of *Avalon Amusement Corp. v. United States*, 165 F. 2d 653, wherein it was held that a dance hall or ballroom was liable for the cabaret tax under Section 1700(e) of

the Code, as then amended, and that such tax applied to all amounts paid by patrons for food, refreshment, or merchandise in connection with the furnishing of music or dancing.

In 1948, taxpayer took over the Riverside Rancho [R. 33] and began paying cabaret taxes. [R. 36.] Taxpayer continued to pay cabaret taxes during the period in question, December 1, 1949, through November 1, 1951, with certain of those payments being made up to December 31, 1951. (Br. 1.)

After the decision in the *Avalon* case, *supra*, the question as to whether or not the cabaret tax under Section 1700(e) should be applied to dance halls and ballrooms again arose in *Geer v. Birmingham*, 88 Fed. Supp. 189 (N. D. Iowa), wherein the District Court held that ballrooms of the type and kind operated therein were not subject to the cabaret tax under Section 1700(e). On appeal, the United States Court of Appeals for the Eighth Circuit reversed (*Birmingham v. Geer*, 185 F. 2d 82, certiorari denied, 340 U. S. 951), holding that the dancing establishment involved in that case fell within the reach of Section 1700(e) with regard to both the character of the establishment and the nature of the entertainment furnished to its patrons. That is, the music and dancing privileges were afforded in connection with the serving of refreshments, and the music and dancing privileges furnished constituted a public performance for profit within the meaning of that term as used in Section 1700(e). In so holding the Eighth Circuit relied upon the plain language of Section 1700(e) and supported its conclusion with excerpts from the decision of the Seventh Circuit in the *Avalon* case, *supra*, wherein that court, likewise rely-

ing on the plain language of the section, held, as we have pointed out above, that Section 1700(e) was applicable to a dancing establishment.²

After the Eighth Circuit decision in *Birmingham v. Geer*, *supra*, Congress, through Section 404(a) of the Revenue Act of 1951, amended Section 1700(e) of the Code by inserting after the second sentence thereof the following new sentence:

In no case shall such term include any ballroom, dance hall, or other similar place where the serving or selling of food, refreshment, or merchandise is merely incidental, unless such place would be considered, without the application of the preceding sentence, as a "roof garden, cabaret, or other similar place."

²Taxpayer goes outside the record to a January 19, 1951, letter of the Deputy Commissioner of Internal Revenue upon which to base a contention that he was severely penalized by a retroactive application of the cabaret tax to the period beginning in 1948 for dance halls even though the serving of refreshments was incidental. (Point 3, Br. 23-27.) This contention not only is not relevant as to taxpayer but is based upon an erroneous understanding of the letter of January 19, 1951. First, taxpayer began paying cabaret taxes in 1949 (Br. 1), and as he admitted below, he was well aware of the Government's application of the cabaret tax to his establishment. [R. 36.] Secondly, the January 19, 1951, letter referred to by taxpayer (Br. 23-24) and which is not in the record, did not apply retroactively. Taxpayer should have known of this fact since he makes detailed reference later in his brief (pp. 44-45) to *Peony Park v. O'Malley*, 121 Fed. Supp. 690 (Neb.), affirmed, 223 F. 2d 668 (C. A. 8th), certiorari denied, 350 U. S. 845. In that decision, the District Court expressly points out that dance halls which had not been reporting and paying the cabaret tax were to be advised of the liability and "such liability would be incurred effective as of the date of notice from the collector's office." (*Peony Park v. O'Malley*, 121 Fed. Supp., p. 694.) Furthermore, although prior to 1951 there was some lack of uniformity in enforcement due to the uncertainty in the interpretation of the law, there is no question that neither the law nor its enforcement violates the Constitution. (*Peony Park v. O'Malley*, 223 F. 2d 668, 673 (C. A. 8th).)

By subsection (b) of Section 404, the above amendment was specifically and expressly made applicable only with respect to the taxable period after the first day of the first month which begins more than 10 days after the date of the enactment of the 1951 Act. The Revenue Act of 1951 was enacted on October 20, 1951. Therefore, the amendment made by subsection (a) became effective only for the taxable periods beginning after November 1, 1951.

In an effort to escape the effect of the Seventh and Eighth Circuits' decisions in *Avalon*, *supra*, and *Geer*, *supra*, the taxpayer contends that the 1951 amendment to Section 1700(e) was merely a "clarification" amendment declaratory of existing law (Br. 40, 53), and should be given retroactive effect as part of the original Section 1700(e).³ A similar argument was made before the Eighth Circuit in a group of consolidated cases, titled *Peony Park v. O'Malley*, 223 F. 2d 668, certiorari denied, 350 U. S. 845. The Eighth Circuit rejected this contention since it found that the 1951 amendment intended to and did effectuate a change and could not be considered a declaration of existing law. As the Eighth Circuit summarized (*Peony Park v. O'Malley*, *supra*, p. 672), the Congressional Reports⁴ on the—

1951 amendment show that Congress was fully aware of the interpretation placed on cabaret taxes by the *Avalon* and the *Geer* cases, and that it was its desire to amend the statute to avoid the construction placed

³As we read taxpayer's brief, we understand Points 2, 4, 5 and 6 of the argument to be directed to this contention.

⁴H. Rep. No. 586, 82d Cong., 1st Sess., p. 126 (1951-2 Cum. Bull. 357, 448), and S. Rep. No. 781, Part 2, 82d Cong., 1st Sess., p. 69 (1951-2 Cum. Bull. 545, 593) (Appendix, *infra*).

on the original statute by the courts. It seems clear that Congress knew that it was changing the former law as interpreted by the courts. There is nothing in the amendment or in its legislative history to warrent any inference that Congress intended the change to be retroactive. On the contrary subsection (b) of the amendment specifically provides that the amendment "shall be applicable only with respect to periods after [November 1, 1951] * * *."

The District Court also rejected the same contentions when made herein and agreed with the conclusion of the Eighth Circuit in *Peony Park v. O'Malley*, *supra*, that the amendment was not retroactive. [R. 19.] In reaching this conclusion, the District Court said that not even a tax statute is given retroactive effect unless it is such by its very terms. [R. 19.] This was but the application of the general rule of statutory construction that unless the contrary appears, or in the absence of language plainly indicating the contrary, amendatory legislation must be given only prospective effect and cannot be applied retrospectively. *Hassett v. Welch*, 303 U. S. 303, 307; *Brewster v. Gage*, 280 U. S. 327, 337; *United States v. Magnolia Co.*, 276 U. S. 160, 162; *United States v. St. Louis, etc. Ry. Co.*, 270 U. S. 1; *Fullerton Co. v. Northern Pacific*, 266 U. S. 435, 437; *Southwestern Coal Co. v. McBride*, 185 U. S. 499, 503; *Russell v. United States*, 278 U. S. 181, 187-188; *McDougald v. New York Life Ins. Co.*, 146 Fed. 674, 678 (C. A. 9th); *United States v. Jackson*, 143 Fed. 783, 788 (C. A. 9th); *Mogis v. Lyman-Richey Sand & Gravel Corp.*, 189 F. 2d 130, 142 (C. A. 8th); *Girard Inv. Co. v. Commissioner*, 122 F. 2d 843, 846 (C. A. 3d). Quite apart from

this general rule, however, is the particular fact that Congress specifically provided in Section 404(b) of the 1951 amendment that the amendment was to be applied only with respect to taxable periods beginning November 1, 1951. Both the Eighth Circuit (*Peony Park v. O'Malley, supra*) and the District Court herein [R. 19] gave this fact great weight, noting that Congress itself in amending the section stated that it should be effective only prospectively. Although taxpayer does acknowledge that there was in fact such an effective date (Br. 40), he significantly neglects to explain his confusion as to its meaning in the 1951 amendment.

Apparently to avoid the purport of the above authorities, taxpayer quotes extensively from *Commissioner v. Estate of Holmes*, 326 U. S. 480, and from *Jordan v. Roche*, 228 U. S. 436. The *Holmes* case, *supra*, supports the Director rather than the taxpayer. The *Holmes* case, *supra*, involved a situation in which Congress attempted to avoid a retroactive application of a new amendment, even though it believed that that particular amendment was declaratory of existing law, due to dicta in a Supreme Court decision which raised doubt as to the interpretation of that prior law. When the question came before the Supreme Court in *Holmes, supra*, the Court agreed with the Congressional view of existing law, which was supported by administrative interpretation and by the decisions of the Circuit Courts of Appeals except for the one in review, and reversed that latter circuit. In the instant case, Congress expressly provided an effective date in the future knowing that it was changing the laws as properly construed by the Seventh and Eighth Circuits. It is clear from *Holmes, supra*, that if Congress had desired to make the 1951 amendment herein retroactively

applicable it could have done so. But Congress recognizing the reasonableness and correctness of the construction placed upon Section 1700(a) as it stood in *Avalon Amusement Corp. v. United States*, 165 F. 2d 653 (C. A. 7th), and in *Birmingham v. Geer*, 185 F. 2d 82 (C. A. 8th), certiorari denied, 340 U. S. 951, chose to limit the change to future taxable transactions. The other decision, *Jordan v. Roche*, 228 U. S. 436, is distinguishable from the present situation. A Second Circuit decision gave rise to an amendment changing the law and after the amendment, the Second Circuit itself doubted the correctness of its prior decision and therefore certified the question to the Supreme Court. (*Jordan v. Roche, supra.*) But herein after the 1951 amendment, the Eighth Circuit, whose decision gave rise to that amendment, reaffirmed its previous decision and acknowledged the clear Congressional expression of a prospective effective date. (*Pcony Park v. O'Malley*, 223 F. 2d 668).)

In an attempt to refute the holding of the District Court that the 1951 amendment is not to be applied retroactively [R. 19, 24], the taxpayer repeatedly (Br. 31, 34, 35, 43, 46) claims that the amendment was declaratory of existing law because, says taxpayer, Congress said in its Reports (Appendix, *infra*)⁵ that the *Avalon* and *Geer* decisions did not reflect the intent of Congress "in enacting the prior law." But the Reports do not say that. The Reports do say that the section amends Section 1700(e) to exempt bona fide dance halls where the sale of refreshments is merely incidental, which amendment

⁵Taxpayer also refers (Br. 38) to H. Rep. No. 586, 82d Cong., 1st Sess., p. 54 (1951-2 Cum. Bull. 357, 396). The comments above refer to that reference as well as those appearing in the Appendix, *infra*.

shall take effect as of a future day (November 1, 1951). The Reports do say that the purpose of this amendment is to avoid the construction of the *Avalon* and *Geer* decisions, which taxed dance halls as cabarets even though the sale of refreshments was merely incidental. But nowhere in the Reports is there any statement or even indication that the 1951 amendment was declaratory of the meaning of Section 1700(e) as it stood prior to the amendment and that such was not the intent of Congress is seen from the prospective date in the amendment itself. Furthermore, even assuming for the moment that such statements had been made, they would be of no effect for as the District Court noted [R. 18], Congress does not have the power to tell the courts to interpret a statute in a certain way. *Koshkonong v. Burton*, 104 U. S. 668; *Stockdale v. Insurance Companies*, 20 Wall. 323; *Ogden v. Blackledge*, 2 Cranch 272; *Union Iron Co. v. Pierce*, 24 Fed. Cas. 583.

Inasmuch as the 1951 amendment was not applicable to the period in question, the District Court applied Section 1700(e)(1) as amended prior thereto. In so doing the District Court found that both the Seventh and Eighth Circuits, which had passed upon the applicability of the tax to dance halls in the *Avalon* and *Geer* cases, *supra*, were correct in holding such establishments subject to the tax and adopted their interpretation. [R. 17-18.]

II.

Even If the Provisions of Section 404(a) of the Revenue Act of 1951, Amending Section 1700(e) of the Internal Revenue Code of 1939, Were Retroactively Applicable to the Taxable Period Involved in This Case, Taxpayer Was Liable for the Tax.

Even if the 1951 amendment were to be applied retroactively, the taxpayer would not be relieved of his liability for the cabaret taxes in question. Under the tests set forth in *Geer v. Birmingham*, 88 Fed. Supp. 189 (N. D. Iowa), taxpayer's establishment, the Riverside Rancho, does not fall within the exception of the 1951 amendment which excludes from the cabaret tax a "ballroom" or similar place in which the sale of refreshments is "merely incidental."

Inasmuch as taxpayer's sale of food and refreshments was approximately 47% of total sales during the period in question [Deft. Ex. A; R. 44], it certainly was not "merely incidental" so as to exempt the Riverside Rancho from the cabaret tax. *In re Duffin*, 141 Fed. Supp. 869 (S. D. Cal.); *Flores v. Riddell* (S. D. Cal.), decided November 12, 1957 (1957 P-H, par. 44,934.14); *Kantor v. United States*, 154 Fed. Supp. 58 (N. D. Tex.) (1956 P-H, par. 44,555); *Jones v. Fox* (Md.), decided July 11, 1957 (1957 P-H, par. 44,927.6); *compare, Boackle v. United States* (N. D. Ala.), decided October 26, 1956 (1956 P-H, par. 44,617), relied upon by taxpayer (Br. 10), in which the sale of refreshments was held incidental since it was only 27% of total sales. It should be noted that the high percentage sale of food and refreshments is not mentioned in taxpayer's comparison table (Br. 7), although the courts above applying Section 1700(e), as amended in 1951, certainly give great weight to this

factor, as did the District Court in *Geer v. Birmingham*, 88 Fed. Supp. 189, 193, which stressed that only approximately 27% of total sales therein were from the sale of refreshments.

Other factors deemed significant by the District Court in *Geer v. Birmingham*, 88 Fed. Supp. 189 (N. D. Iowa), omitted from taxpayer's table (Br. 7), also indicate that the Riverside Rancho fell within the definition "roof garden, cabaret, or other similar place." The Riverside Rancho encompassed a dining room, a liquor and beer bar, a checkroom, a milk bar, and a hot dog stand as well as a dance area. [R. 60-62.] The admission charge gave patrons unrestricted access to these various facilities of the Riverside Rancho. [R. 62-63.] Only 7,000 square feet of the 43,000 square feet (approximately an acre) was devoted to the dance area. [R. 60-61.] Liquor and beer were served in the Riverside Rancho [R. 60], as contrasted with the *Geer* case, *supra*, in which neither was served. Although no refreshments were allowed in the dance area, patrons could pass freely from the liquor bar to the dance area via a five foot opening. [R. 60-61.] Taxpayer does mention that only benches were provided in his "ballroom." (It is our understanding that at this point taxpayer is referring to the dance area.) (Br. 7.) Considerable additional seating was provided in the dining room and in the liquor bar. [R. 60-61.]

The Director grants that the dance area, if taken by itself, would be a "ballroom." But it is merely part of the Riverside Rancho. It is obvious from the above recital that the Riverside Rancho is so much more than a mere dancing area serving "incidental" refreshments that it is subject to the cabaret tax, even assuming that the

Avalon Amusement Corp. v. United States, 165 F. 2d 653 (C. A. 7th), and *Birmingham v. Geer*, 185 F. 2d 82 (C. A. 8th), construction is not applicable due to the 1951 amendment.

Conclusion.

The decisions of the Seventh and Eighth Circuits set forth the correct interpretation of Section 1700(e) as applicable to this case. In any event, taxpayer's establishment was subject to the cabaret tax since his establishment is not a ballroom wherein the serving of refreshments is incidental. It is respectfully submitted that the taxes here involved were properly assessed. The decision of the District Court is correct and should be affirmed.

Respectfully submitted,

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February, 1958.

APPENDIX.

Internal Revenue Code of 1939:

SEC. 1700 [as amended by Sec. 542, Revenue Act of 1941, c. 412, 55 Stat. 687, and Sec. 622 of the Revenue Act of 1942, c. 619, 56 Stat. 798]. Tax.

There shall be levied, assessed, collected, and paid—

(e) *Tax on Cabarets, Roof Gardens, Etc.*—

(1) *Rate.*—A tax equivalent to 20 per centum⁶ of all amounts paid for admission, refreshment, service, or merchandise, at any roof garden, cabaret, or other similar place furnishing a public performance for profit by or for any patron or guest who is entitled to be present during any portion of such performance. The term “roof garden, cabaret, or other similar place” shall include any room in any hotel, restaurant, hall, or other public place where music and dancing privileges or any other entertainment, except instrumental or mechanical music alone, are afforded the patrons in connection with the serving or selling of food, refreshment, or merchandise. A performance shall be regarded as being furnished for profit for purposes of this section even though the charge made for admission, refreshment, service, or merchandise is not increased by reason of the furnishing of such performance. No tax shall be applicable under subsection (a)(1) on account of an amount paid with respect to which tax is imposed under this subsection.

* * * * *

(26 U. S. C. 1952 ed., Sec. 1700.)

⁶This rate was changed to 20 per centum by Section 1650 of the Internal Revenue Code of 1939, as added by Section 210 of the Revenue Act of 1940, c. 419, 54 Stat. 516, and amended by Section 302 of the Revenue Act of 1943, c. 63, 58 Stat. 21, and Section 3(a), Public Debt Act of 1944, c. 240, 58 Stat. 272.

Revenue Act of 1951, c. 521, 65 Stat. 452:

SEC. 404. TAX ON CABARETS, ROOF GARDENS, ETC.

(a) *Ballrooms and Dance Halls*.—Section 1700 (e)(1) (relating to tax on cabarets, roof gardens, etc.) is hereby amended by inserting after the second sentence thereof the following new sentence: “In no case shall such term include any ballroom, dance hall, or other similar place where the serving or selling of food, refreshment, or merchandise is merely incidental, unless such place would be considered, without the application of the preceding sentence, as a ‘roof garden, cabaret, or other similar place.’”

(b) *Effective Date*.—The amendment made by subsection (a) shall be applicable only with respect to periods after 10 ante-meridian on the first day of the first month which begins more than ten days after the date of the enactment of this Act.

Treasury Regulations 43 (1941 ed.):

SEC. 101.14 [as amended by T. D. 5192, 1942-2 Cum. Bull. 249]. *Scope of Tax*.—The term “roof garden, cabaret, or other similar place” included any room in any hotel, restaurant, hall, or other public place where music and dancing privileges or any other entertainment, except instrumental or mechanical music alone, are afforded the patrons in connection with the serving or selling of food, refreshment, or merchandise. A public performance furnished at a roof garden, cabaret, or other similar place shall be regarded as being furnished for profit for purposes of this section even though the charge made for admission, refreshment, service, or merchandise is not increased by reason of the furnishing of such performance.

Where music, whether by an orchestra, a mechanical device, or otherwise, and a space in which the patrons may dance is furnished in the dining room of a hotel, or in a restaurant, bar, etc., the entertainment constitutes a public performance for profit at a roof garden, cabaret, or similar place, and the payments made for admission, refreshment, service, and merchandise are subject to the tax.

* * * * *

Examples. (1) A proprietor of a dancing establishment provides for the serving of refreshments to his patrons. An admission or cover charge is made to each patron. In this case the admission or cover charges and also the charges for refreshment, service, and merchandise are subject to the tax.

* * * * *

H. Rep. No. 586, 82d Cong., 1st Sess., p. 126 (1951-2 Cum. Bull. 357, 448):

SEC. 404. TAX ON CABARETS, ROOF GARDENS, ETC.

This section amends section 1700 (e) (1) of the Internal Revenue Code to exempt from the cabaret tax bona fide dance halls, ballrooms, and other similar places where the serving or selling of food, refreshments, or merchandise is merely incidental to the music and dancing privileges furnished unless the conduct of the place is such as to bring it within the normal concept of a roof garden, cabaret, or similar place. This determination will be made by reference to the over-all operation of the establishment, including such factors as the relative income from the several activities over a period of time, the relative portion of space devoted to the various activities, the

type of refreshments served or sold, the scope and character of the entertainment furnished, and the hours of operation.

The purpose of this amendment is to make it clear that the principles set forth by the district court in the case of *Geer v. Birmingham* (88 Fed. Supp. 189) are controlling in the determination of whether the establishment involved is operating as a cabaret or as a dance hall, and to avoid the broad construction placed upon the statute in the case of *Avalon Amusement Corporation v. United States* (165 Fed. 2d 653) and in the court of appeals decision reversing the decision of the district court in the *Geer* case (*Birmingham v. Geer*, 185 Fed. 2d 82), which requires that dance halls and similar establishments be taxed as cabarets even though the serving or selling of food, refreshments, or merchandise is merely incidental.

The amendment made by this section shall take effect at 10 a. m. on the 1st day of the first month which begins more than 10 days after the date of the enactment of this bill.

S. Rep. No. 781, Part 2, 82d Cong., 1st Sess., p. 69 (1951-2 Cum. Bull. 545, 593):

SEC. 404. TAX ON CABARETS, ROOF GARDENS, ETC.

This section, which is identical with section 404 of the House Bill, amends section 1700 (e) (1) of the Code to exempt from the cabaret tax bona fide dance halls, ballrooms, and other similar places where the serving or selling of food, refreshments, or merchandise is merely incidental to the music and dancing privileges furnished unless the conduct of the place is such as to bring it within the normal concept of a

roof garden, cabaret, or similar place. This determination will be made by reference to the over-all operation of the establishment, including such factors as the relative income from the several activities over a period of time, the relative portion of space devoted to the various activities, the type of refreshments served or sold, the scope and character of the entertainment furnished, and the hours of operation.

The purpose of this amendment is to make it clear that the principles set forth by the district court in the case of *Geer v. Birmingham* (88 Fed. Supp. 189) are controlling in the determination of whether the establishment involved is operating as a cabaret or as a dance hall, and to avoid the broad construction placed upon the statute in the case of *Avalon Amusement Corporation v. United States* (165 Fed. (2d) 653) and in the court of appeals decision reversing the decision of the district court in the *Geer* case (*Birmingham v. Geer*, 185 Fed. (2d) 82), which require that dance halls and similar establishments be taxed as cabarets, even though the serving or selling of food, refreshments, or merchandise is merely incidental.

The amendment made by this section shall take effect at 10 a. m., on the first day of the first month which begins more than 10 days after the date of the enactment of this Act.



No. 15696.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

MARTY W. LANDAU, doing business as RIVERSIDE
RANCHO,

Appellant,

vs.

ROBERT A. RIDDELL, individually, and as District Director
of Internal Revenue for the Sixth District of California,

Appellee.

BRIEF FOR APPELLANT.

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FILED

JUN 12 1938

PAUL F. O'BRIEN, CLERK



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No. 15696.

IN THE

United States Court of Appeals
FOR THE NINTH CIRCUIT

MARTY W. LANDAU, doing business as RIVERSIDE
RANCHO,

Appellant,

vs.

ROBERT A. RIDDELL, individually, and as District Director
of Internal Revenue for the Sixth District of California,

Appellee.

BRIEF FOR APPELLANT.

This proceeding involves Excise Taxes, particularly so-called "cabaret taxes" paid by Appellant to Appellee between the first day of December, 1949, and the 31st day of December, 1951, under Section 1700(e) of the Internal Revenue Code of the United States of America, amounting to the total sum of \$19,590.93, which amounts were paid under protest [Tr. of R. p. 33] for the reason that such cabaret taxes were not legally due from Appellant because of the fact that Appellant was not, during said times, operating a cabaret and which taxes were claimed for refund by Appellant under written claim for refund filed by Appellant with Appellee on or about January 25, 1954; and also involves similar taxes assessed by Appellee against Appellant for the period from October, 1950, through October, 1951, in the sum of \$4,450.00, together with penalties and interest allegedly due under the above quoted section, and for which Appellee filed his Complaint in Intervention herein.

The case was heard in the United States District Court, Southern District of California, Central Division, before

Judge Leon R. Yankwich on April 29, 1957, and was submitted for adjudication upon a Partial Stipulation of Facts, the oral testimony of Appellant on behalf of the Appellant, and oral testimony of Bernard Jefferson Irvine O'Connor on behalf of Appellee, and various exhibits introduced and received in evidence.

Issues to Be Decided.

Whether Appellant was proprietor of "a roof garden, cabaret, or similar place" as such term is used in Section 1700(e) of the Internal Revenue Code of 1939, as amended.

Whether the taxes paid by Appellant under protest were legally due from him.

Whether the taxes demanded by Appellee are legally due from Appellant.

Whether the action of Congress in enacting the Revenue Act of 1951 changed the law or merely clarified the prior statute.

Whether the Commissioner of Internal Revenue exceeded his authority in arbitrarily, and without the approval of the Secretary of the Treasury, seeking to have the effect of his unpublished change in his long continued interpretation of his Regulations (Letter of Deputy Commissioner Valaer dated January 19, 1951) go back over previous years during which the appellant operated under the Regulations then in force.

Points Relied on by Appellant.

Appellant has designated, as the points on which he intends to rely in this appeal, the following:

- (1) That the taxpayer was not the proprietor or the owner of an establishment coming with the term "roof garden, cabaret, or similar place" as such term is used in Section 1700(e) of the Internal Revenue Code (1939) as amended.

(2) That under the regulations of the Commissioner of Internal Revenue issued pursuant to the Revenue Act of 1941, which amended Section 1700(e), the Commissioner interpreted said section as excluding dance halls, and ballrooms similar to that conducted by the Appellant from the provisions of said section.

(3) That the cabaret tax was not imposed as a direct tax on the proprietor or owner of a cabaret, roof garden, or similar place. Under the provisions of the Internal Revenue Code he was charged with the duty of returning all payments of such taxes received by him. When the Commissioner of Internal Revenue, or his delegate, by issuing a letter in January, 1951, informing all Collectors of Internal Revenue of the change in his interpretation of Section 1700(e), Internal Revenue Code (1939), as amended, declared that such ruling should be applied retroactively, he penalized all owners and proprietors of dance halls, and ballrooms, similar to that operated by the taxpayer (appellant), who had failed to collect a cabaret tax from their patrons, because of their reliance upon the Commissioner's long standing interpretation of the intent and purpose of Congress, under which he had declared that no cabaret tax was due from them.

(4) That the Commissioner has not published in his Internal Revenue Bulletins or his Cumulative Bulletins any change in the regulations promulgated by him under the provisions of the Internal Revenue Act of 1941, setting forth his interpretation of Section 1700(e) of the Internal Revenue Code of 1939, as amended by the Revenue Act of 1941.

(5) That Congress, speaking through the members of the House Ways and Means Committee and the Senate Finance Committee, on the Revenue Act of

1951, declared that it was its intent and purpose in the passage of Section 1700(e) of the Revenue Code of 1939, as amended in 1941, that dance halls and ballrooms similar to that conducted by the taxpayer were not included within the meaning of the term "roof garden, cabaret, or similar place."

(6) That the action of the Congress in relation to said Section 1700(e) was not a change or amendment of the law as set forth in said section, but was merely a declaration and clarification of the existing law.

Appellant's Statement of Facts.

I. Appellant was the operator of an establishment known as "Riverside Rancho" which is located at 3213 Riverside Drive, Los Angeles, California;

II. The physical layout of the "Riverside Rancho" was as follows:

(1) The entire area within which was located the establishment herein involved was bounded on all sides by a wooden fence approximately seven feet high. Sketch of layout of Riverside Rancho premises Exhibit "B" in evidence, and Exhibit "C" photographs, marked on the reverse side, as follows:

1800-149; 776-2189; 776-2190; 776-2192; 1771-30; 1800-148; 776-2195; 776-2194; 776-2193; 776-2191.

(2) All other pertinent items of description of the establishment are contained in the Stipulation of Facts [Tr. of R. pp. 60-65, incl.]; and shown by testimony of Mr. Landau on direct examination [Tr. of R. pp. 39-41].

III. The method of operation of Appellant's dance hall [Tr. of R. pp. 61-65 incl.].

IV. Appellant's payment of the taxes, the subject of this proceeding, and the fact of their payment under protest is shown [Tr. of R. p. 33]. The payment of the taxes out of Appellant's own pocket [Tr. of R. p. 36].

ARGUMENT.

- (1) The Taxpayer Was Not the Proprietor, or Owner, of an Establishment Coming Within the Term "Roof Garden, Cabaret, or Similar Place" as Such Term Is Used in Section 1700(e) of the Internal Revenue Code of 1939, as Amended.

The word "cabaret" is of French origin, although it has been in use in English-speaking countries for more than two hundred years (Oxford English Dictionary (Second Edition)).

In Webster's New International Dictionary (Second Edition), the word is defined as "A cafe or restaurant where patrons are entertained by performers who dance and sing after the practice of certain French taverns."

In the Universal Dictionary of the English Language, the word is defined as "Small drinking place or night restaurant in which singing or dancing performances are given."

And in a Dictionary of American-English, the word "cabaret" is defined as "A restaurant which provides entertainment by singers, dancers, etc."

The term "roof garden" is defined as "A garden on a flat top of a building; especially a garden where refreshments are served, on the roof of a high building, often with a stage for entertainment."

A careful consideration of the legislative history of the statute in question, hereinafter reviewed, leaves little doubt but that Congress used the term "roof garden" to define the word "cabaret" more precisely.

In the case of *Geer, et al. v. Birmingham* (U. S. D. C., Northern Dist. of Iowa), 88 Fed. Supp. 189 at 193-194 (Jan. 10, 1950), considerable evidence was introduced by the plaintiffs (taxpayers) of an oral and documentary na-

ture. Among the witnesses who testified with respect to this phase of the case were: The District Manager for the States of Iowa, Kansas, and Nebraska, for the American Society of Composers; the traveling representative of the American Federation of Musicians whose territory included ten midwestern states; another witness was in charge of orchestra bookings in eleven midwestern and western states; other witnesses included the Chicago representative of "Billboard," an amusement trade journal having a national circulation, and operators of ballrooms in Iowa and a number of other states. The Court found that all of the witnesses referred to "were thoroughly familiar with the operation of ballrooms and cabarets locally, sectionally, and nationally."

From the testimony of those witnesses the Court arrived at the opinion that, in the amusement trade, the term "night club" is customarily and ordinarily used as a synonym for "cabaret" (p. 194). And reference was made to the New Dictionary (1947) wherein the word "cabaret" is defined as "A night club featuring entertainment by singers and dancers" (p. 194).

Ballrooms and cabarets have many different characteristics, a comparison of which discloses the complete lack of similarity (pp. 194-195) as shown in the table following:

CABARETS.

Size of Dance Floor: 15' x 15'* (225 square feet).

Seating: Provided for all of its patrons, and only admits those it can seat.

Entertainment: Has entertainment separate and distinct from the dance orchestra music.

Admission: Cabarets do not maintain box offices, and do not sell tickets for admission.

Prices Charged: Greatly in excess of those charged by ordinary establishments vending food and drinks.

Receipts: Derived to a great extent from proceeds of sale of food and drinks.

Only a small percentage of cabaret patrons make use of the dancing privileges afforded. Most patrons patronize these establishments for purposes other than dancing—to see the show and partake of food and drinks.

BALLROOMS.

1500 sq. feet to 5000 sq. feet

Provides seating for only a comparatively small number of its patrons, generally not exceeding 20%.

The appellant provided no tables or chairs in his ballroom, only benches lining three sides of such room.

Except on rare occasions, a ballroom provides no entertainment separate and distinct from the dance music. In the appellant's case, entertainment was not furnished, separate and distinct from the dance music.

Ballrooms have box offices where patrons purchase a ticket of admission, and no patrons are admitted without a ticket.

Admission to the Appellant's ballroom was by ticket only, which had to be purchased at the box office, located at the entrance.

Prices comparable with those charged in ordinary retail outlets. This was true with respect to prices charged by the appellant.

The greater part of receipts derived from the sale of admission tickets for dancing privileges.

It is not usual for a person to buy an admission ticket to a ballroom and not dance, since the primary purpose of those attending ballrooms is to dance.

*The District Manager for the American Society of Composers, Authors, and Publishers, testified in *Geer, et al. v. Birmingham, supra*, that the largest cabaret dance floor in his territory was about 15' x 30' (450 sq. feet).

Ballrooms are classified as distinct from cabarets by the American Federation of Musicians, and by the American Society of Composers, Authors and Publishers (p. 195). Operators of cabarets are not eligible for membership in the National Ballroom Operators' Association. In the amusement trade periodical, "Billboard," ballrooms and cabarets are dealt with and covered in separate sections because operators of cabarets are not interested in items pertaining to ballrooms, and the owners of ballrooms are not interested in items pertaining to cabarets.

In the case of *Birmingham v. Geer, et al.* (C. C. A. 8th Cir.), 185 F. 2d 82 at 84, the Court said:

"He (Government Counsel) concedes that the Laramar Ballroom (Taxpayer's Establishment) is not a cabaret within the generally understood meaning of that term."

The legislative history of the statute imposing a tax on "cabarets, roof gardens, and similar places" plainly discloses that Congress recognized the difference between those establishments, and ballrooms and dance halls. And it is only reasonable to assume that Congress was aware of the fact that dance halls and ballrooms were not being made subject to the cabaret tax during a long period of years when it reenacted the statute imposing a tax on cabarets, etc., a number of times with minor charges having no bearing on the question presented herein.

The case of *White v. Aronson, Trustee* (Nov. 8, 1937), 302 U. S. 16, 58 S. Ct. 95, presented the question to the Supreme Court whether jigsaw puzzles were taxable as "games" under Section 609 of the Revenue Act of 1932.

The action was brought to recover \$37,021.63 exacted of the bankrupt by the Collector of Internal Revenue on account of jigsaw puzzles manufactured and sold from June 21, 1932, to May 1, 1933.

The court below (C. C. A., 1st Cir.) after citing the definition of “puzzles” contained in Webster’s New International Dictionary (2d Ed.), pointed out (p. 19) that:

“A jig saw puzzle was never taxed under Section 900(5) of the Act of 1918. It was not taxed until after the passage of Section 609 of the Revenue Act of 1932, when the Government attempted to tax it as a game. The Act of 1932 became effective June 6, 1932. On August 26, 1932, the Commissioner issued a ruling stating that jig saw or die cut puzzles were not taxable. On November 14, 1932, he issued a ruling that they were taxable. On February 7, 1933, he ruled that after February 7, 1933, they were taxable if they contained more than fifty pieces. And on April 20, 1933, he ruled that they were taxable after June 21, 1932, if they contained more than fifty pieces.”

In affirming the decision of the Circuit Court, which had decided the case in favor of the taxpayer, the Supreme Court (p. 20) said:

“Ample evidence disclosed that in commercial usage jig saws were never regarded as games; also that the trade recognized a definite distinction between puzzles and games. We must assume that Congress had knowledge of these things; also knew that jig saw puzzles were not assessed for taxes under the Acts of 1917 and 1918; and further, was not unmindful of the uncertainties concerning the meaning of ‘game’ disclosed by *Baltimore Talking Board Co. v. Miles*, 280 Fed. 658 (at pp. 659-662), and *Mills Novelty Co. v. United States*, 50 F. (2d) 476.

“The claim for the taxpayer does not rest upon an exception to a general rule but upon the construction of general language found in the act.

“Where there is a reasonable doubt as to the meaning of a taxing act it should be construed most favorably to the taxpayer. *Gould v. Gould*, 245 U. S. 151. ‘Tax laws, like all other laws, are made to be obeyed. They should therefore be intelligible to those who are expected to obey them.’ *Philadelphia Storage Battery Co. v. Lederer*, 21 F. (2d) 320, 321, 322” (pp. 20-21).

“If any doubt could be deemed to exist . . . the doubt must be resolved in favor of the taxpayer (*U. S. v. Merriam*; 263 U. S. 179; 44 S. Ct. 69).” (P. 21.)

In the case of *Boackle v. United States* (D. C. Northern Dist. Ala. U. S. T. C. 56-2, #9986), the Court found that plaintiff operated a ballroom consisting of a bandstand, a dance floor, and to either side of the dance floor space where 55 to 60 tables were located which could seat approximately 275 persons; he charged admission to the ballroom; that plaintiff furnished approximately 400 chairs; but served no food but sold ice, soft drinks, potato chips, lemons, and beer; that plaintiff did not sell liquor but some of the dancers brought their own; that waiters were employed by plaintiff to serve set-ups; that plaintiff charged 30 or 35 cents for a bucket of ice, 35 cents for a package of cigarettes, 35 cents for beer. . . . The Court determined that the plaintiff was not subject to the cabaret tax provided by Section 1700(e), I. R. C., 1939, as premises operated by plaintiff is a ballroom within the meaning of said section. The Commissioner has not appealed from this decision.

In appellant's ballroom, no refreshments were sold or allowed, nor was any service of any kind provided therein. There were benches along the walls of the ballroom but no tables or chairs [Tr. of R. p. 63].

It is therefore apparent, that appellant's establishment was not a "roof garden, cabaret, or similar place" as defined in Section 1700(e), I. R. C., 1939, as amended.

- (2) Under the Regulations of the Commissioner of Internal Revenue Issued Pursuant to the Revenue Act of 1941, Which Amended Section 1700(e), the Commissioner Interpreted Said Section as Excluding Dance Halls, and Ballrooms Similar to That Conducted by the Appellant From the Provisions of Said Section.

Section 1700(e)(1) of the Internal Revenue Code (1939), prior to amendment, provides for a tax on "the amount paid for admission to any place including admission by season ticket or summer subscription." The rate of this tax was fixed at one cent for each five cents or major fraction thereof.

Section 1700(e)(1) of the Internal Revenue Code (1939), as amended, provides for a tax on "all amounts paid for admission, refreshment, service, or merchandise, at any roof garden, cabaret, or similar place furnishing a public performance for profit, by or for any guest who is entitled to be present during any portion of such performance."

The history of Section 1700, Internal Revenue Code, *supra*, began in the year 1917, when Congress, for the first time, imposed a tax upon entertainment of various kinds. The report of the House Finance Committee on the bill which became the Revenue Act of 1917, stated:

"It is recommended that this tax be imposed upon all places to which admission is charged, such as motion picture shows, theatres, circuses, entertainments, cabarets, ball games, athletic games, etc."

The difficulty of imposing this "admissions tax" upon the category of entertainment in existence at that time

known as "cabarets," which usually made no admission charge but rather included the price of admission in the price charged for refreshments, service, or merchandise, was brought to the attention of the Senate Finance Committee by the representative of the "Theatrical Managers' Association," who stressed the fact that the theatres' chief competitor, "and the single interest that has done more to detract from the theatrical patronage than anything else in the United States" was the cabaret.

As a result, the Senate Finance Committee recommended an amendment of the House bill embodying a provision that the tax on admissions to cabarets be computed at the rate of one cent for every ten cents paid for refreshments, etc. The said amendment stated that:

"The purpose of this amendment is to impose a tax upon admissions to what are *commonly known as cabarets*, at the same rate as is imposed upon admissions to similar entertainments or amusements."

The Senate amendment was agreed to by the House of Representatives, and incorporated in the Revenue Act of 1917.

It would appear to be clear that the tax imposed by *Section 1700 of the Revenue Act of 1917, supra*, was an admission tax which had been enacted in two parts because of the particular nature of the operation of cabarets.

Treasury Decision 2603 was issued on or about December 4, 1917, and sought to establish a formula for the computation of the "admission tax" in the case of any "*cabaret or similar entertainment*." It provided, in substance, that 20% of the amount paid for refreshments, merchandise, service, etc., including any sum paid for seats and tables reserved or occupied, at any public performance for profit at any cabaret or other *similar entertainment*, to which the charge for admission is wholly, or

in part, included in the amount so paid, shall be regarded and deemed to be paid for admission to such performance.

An explanation of this rule for determining that proportion of the total charge of a cabaret or other similar entertainment which was attributable to the admissions charge of such establishment, as well as a recommendation that the tax be increased, was included in the Report of the House Ways and Means Committee, subsequently enacted as the Revenue Act of 1918. The use of the language "The tax upon admission to roof gardens, cabarets, and other similar entertainments is increased * * *," has been interpreted to be an attempt to delimit more precisely the term "cabaret."

The Revenue Acts of 1921, 1924, and 1926 made no changes, except as to the rate of tax, or exemption from tax on small admissions charges.

The first Treasury Regulations on the subject were issued in 1918. They were continued in subsequent years (1919, 1921, 1922 and 1924 editions). In 1926 that portion of Treasury Regulations 43, applicable to the tax on admissions to any public performance for profit at any roof garden, cabaret, or other similar entertainment contained the following:

*"Art. 9—Entertainments included. 'Any public performance for profit at any roof garden, cabaret, or other similar entertainment' includes every public vaudeville, or other performance or diversion in the way of acting, singing, declamation, or dancing, either with or without instrumental music, conducted for the profit of the management by professionals, amateurs, or patrons under the auspices of the management, in connection with the service or selling of food or other refreshment or merchandise at any room in any hotel, restaurant, hall or other public place * * *."*

Then follows a series of examples (7), only one of which is pertinent to the instant discussion, which reads:

“(2) A certain hotel provides a space *in* its dining room for dancing and charges \$1.00 admission to everyone entering the room. The prices charged for food are not increased to cover the cost of the entertainment furnished. In this case the amount paid for admission is not included in the price paid for refreshment but is this separate \$1.00 charge. This charge, therefore, is taxable as an ‘amount paid for admission under Section 500(a)(1) of the Act and the tax is ten cents. (See Art. 1.)’”

It has generally been considered by writers on this subject that the Treasury Department in the issuance of these 1926 Regulations, had the same intent as did Congress in regard to the taxing of roof gardens, cabarets, and similar entertainments, *i. e.*,

“to insure that such types of entertainment would pay an admissions tax upon what would be a fair and reasonable admission in comparison with the other charges they imposed, whether such amount was charged to their patrons as an ordinary admission, or was disguised in the price patrons had to pay for refreshment, service, or merchandise.”

Under the 1926 Regulations, the operator of a roof garden, cabaret, or other similar entertainment furnishing a public performance for profit could pay an admission tax under Section 500(a)(1) of the general admissions tax section of the 1926 Revenue Act, on any direct admissions charge imposed and also be subject to tax under Section 500(a)(5), the roof garden and cabaret tax section, for a tax on those charges he made for refreshment, service, or merchandise, *if the admission charge was considered inadequate, or if the charges for refreshment, service,*

or merchandise, were increased DURING THE PERIOD OF THE ENTERTAINMENT.

This interpretation by the Treasury Department's official regulations seems to be in line with the indicated intent of Congress to impose an admissions tax upon that portion of the charges made by a roof garden, cabaret, or other similar entertainment which could fairly be attributable to an admissions charge, regardless of the form in which the charge by such establishment was made. Also, that the Treasury Department, as well as Congress, apparently realized that there was a problem peculiar to roof gardens, cabarets, and the like, which was not present in the case of the usual place of amusement imposing a direct admissions tax, such as a theatre, skating rink, dance hall, opera, and the like.

The Revenue Acts of 1928, 1932, 1936 and 1938 effected only minor changes in Section 500(a)(5) of the Revenue Act of 1926, none of which has any bearing on the issue involved herein.

Treasury Regulations 43, issued under the provisions of the Revenue Act of 1926 remained the same for 1927. In 1930, Articles 8 and 9 of Regulations 43 became Articles 10 and 11, of Regulations 43. Example 2 under Article 8, and examples 2 (as set forth above) and 7, under Article 9 were omitted from the said Regulations.

It would seem that the Bureau of Internal Revenue recognized the distinction between the ordinary admission charge made by a theatre, dance hall, skating rink, and the like, and the type of admission charge made by a cabaret, or similar place, as evidenced by its rulings: S. T. 726, CB XIII-1 (1934); P. 431; S. T. 799, CB XIV-1 (1935) 420; and T. D. 4749, CB 1937-2, 519-520.

While the Regulations promulgated by the Commissioner of Internal Revenue, with the approval of the Sec-

retary of the Treasury, were revised from time to time, to omit certain examples contained in earlier editions, and to add one or two new ones, there was no change in the prescribed method of computing the tax on admissions to cabarets, and similar places, from 1930 until 1941, when Congress decided to change the method of computing the cabaret tax under Section 1700(e) and the corresponding regulations.

The House Ways and Means Committee, in its report prepared to accompany the Revenue Bill of 1941, referred to the "serious administrative difficulties" encountered by the Bureau in seeking to collect the tax imposed by Section 1700(e), in the case of hotel dining rooms wherein music and dancing were furnished in connection with the serving of food, and no admission charge was imposed, either directly, by a direct charge, or indirectly, by including the charge for such music and dancing privileges in the price of food. (See *United States v. Broadmoor Hotel Co.* (D. C.—Colo., 1929), 30 F. 2d 440; also, *Deshler Hotel Co. v. Busey* (D. C. S. D. Ohio, 1941), 36 Fed. Supp. 392; affirmed C. C. A. 6th Cir., *Busey v. Deshler Hotel Co.*, 130 F. 2d 187, 192.)

In accordance with the House and Senate Committee Reports on the Revenue Bill of 1941, the basis for the computation of the "cabaret tax" was changed to read as follows:

"(e) Tax on Cabarets, Roof Gardens, etc.

"(1) Rate.—A tax equivalent to 5 per centum of all amounts paid for admission, refreshment, service, and merchandise, at any roof garden, cabaret, or other similar place furnishing a public performance for profit, if any payment, or part thereof, for admission, refreshment, service, or merchandise, entitles the patron to be present during any portion of such performance."

Thus, for the first time, since a tax on these types of entertainment was imposed in 1917, that portion of the statute imposing a tax on cabarets, roof gardens, or similar entertainments, no longer needed to be supplemented by that portion of the statute taxing admissions generally, inasmuch as Section 1700(e) (the "cabaret tax" section) now contained both a different rate and a different base than Section 1700(a), the "admissions tax" section, and was designed to tax any charge made by a cabaret, roof garden, or similar place, in whatever form such charges were imposed.

Section 542 of the Revenue Act of 1941 amended Section 1700(e) of the Internal Revenue Code to include the following new provisions:

"(e) Tax on Cabarets, Roof Gardens, etc.

"(1) Rate * * *

"(2) By whom paid.—The tax imposed under paragraph (1) shall be returned and paid by the person receiving such payments."

The discussions of the tax on cabarets contained in the House Ways and Means Committee Report, and the Senate Finance Committee Report, on the Revenue Bill of 1941, disclose that this change in the existing statute was made in order to overcome difficulties encountered in collecting the tax.

After the enactment of the Revenue Act of 1941, the Commissioner of Internal Revenue issued a memorandum letter dated September 26, 1941, to all of the Collectors of Internal Revenue throughout the country which memorandum was published in Internal Revenue Cumulative Bulletin 1941-1942, page 260, as Mimeograph 5255, summarizing the changes effected by the Revenue Act of 1941, amending Section 1700(a) of the Internal Revenue Code, imposing a tax on amounts paid for admission to any place, and by the amendment of Section 1700(e) which

imposed a tax on amounts charged at cabarets, roof gardens, and similar places.

The portions of said Mimeograph 5255 deemed pertinent to the instant proceeding, read as follows:

“This tax is not required to be collected from the patron, as heretofore, but there is no objection to the cabaret, etc., passing it on to the patron if billed separately and in the exact amount. (Section 542 effected these changes.)

“Since there are a number of motion picture theatres, skating rinks, dance halls, etc., the admissions to which were not taxable before October 1, 1941, but will be taxable on that date, and thereafter, appropriate information should be circulated to such theatres, skating rinks, dance halls, etc., at the earliest practicable moment; and they should be advised that all admission charges are subject to the tax except in the case of admissions of less than ten cents charged to children under 12 years of age.”

At the time Congress enacted the Revenue Act of 1943, and in the Report of the House Ways and Means Committee, on that Revenue Bill, cabarets were singled out in the following statement:

“With the exception of a few roadhouses that have been hurt by the gasoline shortage, cabarets have been experiencing an unprecedented demand for their entertainment services. It is felt that this is more of a luxury than those services which are subject to the general admissions tax * * *.”

It was proposed to increase the tax on cabarets from 5% to 30%, which proposal was subsequently adopted. In 1944, the rate was reduced to 20%.

During the years from 1941 through March, 1947, in response to requests from Collectors of Internal Revenue, and/or owners and proprietors of dance halls, and ball-

rooms, operated in a manner similar to that of the appellant herein, the Commissioner, or his delegate, issued numerous rulings in which these persons were notified that the particular establishment was not taxable as a cabaret, or similar place.

In the case of *Geer, et al. v. Birmingham* (U. S. D. C. Northern Dist. of Iowa), 68 Fed. Supp. 189, a number of such letters issued during the years 1942 to 1947, inclusive, over the signatures of the Deputy Commissioner, Miscellaneous Tax Unit, U. S. Bureau of Internal Revenue, and those of Chiefs of the Miscellaneous Tax Divisions of the various field offices of the Bureau of Internal Revenue, were received in evidence, and have been included in the published report of that case (pp. 215-220 incl.).

One of such letters received in evidence in *Geer v. Birmingham, supra*, was dated September 21, 1944, and addressed to Larry Geer, Manager, Laramore Ballroom, informing him his establishment was not taxable as a cabaret or similar place (p. 219).

A reading of those letters will disclose that, in each case ruled upon, the refreshments were served within the ballroom, or dance hall.

In the instant case, no refreshments were sold or served within the ballroom, nor were they allowed to be carried into the same. There were no tables or chairs available for this purpose, and only benches extending along certain of the walls of the ballroom were provided for the convenience of patrons of the appellant's establishment, for resting between dances, and during intermission.

Anyone purchasing a ticket for admission to the Appellant's ballroom, upon which an admission tax was collected, as required by Section 1700(a) of the Internal Revenue Code (1939), was entitled to all of the privileges of the ballroom. Such patrons were not required to purchase any refreshments, or other merchandise.

On the other hand, no sum, however large, expended for food, refreshments, merchandise, etc., would entitle such purchaser to enter the ballroom without first purchasing a ticket of admission, at the window regularly maintained for that purpose and paying the Federal admission tax thereon.

The earliest of the rulings issued by the Commissioner of Internal Revenue, which was received in evidence by the Court, in *Geer, et al. v. Birmingham, supra*, (p. 220) was released under date of December 18, 1942, to the operator of a ballroom at Lincoln, Nebraska, known as the Turnpike Casino. At that time, the rate of the so-called "cabaret tax" was 5% while the tax on admissions was 10%. The operator of the said ballroom sought to have his establishment classified as a cabaret. His request was denied in a letter directed to him by the then Collector of Internal Revenue. The pertinent portion of his letter reads as follows:

"This office must be guided by the rulings issued by the Commissioner of Internal Revenue. The rulings which have been issued to date leave no question as to the taxability of your establishment. There seems to be no possible reason for taxing the Turnpike Casino on the basis of a cabaret tax rather than on the admissions tax basis."

No change in the law (Section 1700(e)(2) of the Internal Revenue Code, as amended by the Revenue Act of 1941), was made by the succeeding Acts of 1943, 1945, 1946, and the Excise Tax Act of 1947, which disclosed any dissatisfaction, on the part of Congress, with the Executive Branch of the Government's interpretation of that statute during such period of years.

And, since Congress, during those years, was seeking means of obtaining additional revenue, it is only reasonable to credit that legislative body with full knowledge of the

Commissioner's interpretation of the Regulations issued by him, under authority of Section 1700(e)(2), and the many rulings issued by him, or his delegates throughout the country, to taxpayers who operated dance halls, and/or ballrooms, in a manner similar to that of the Appellant, advising them that they were not subject to the cabaret tax imposed by Section 1700(e)(2) of the Internal Revenue Code, as amended.

If Congress was not satisfied with the then interpretations by the Commissioner, of the statute imposing a tax on cabarets, or, if in its desire to obtain additional revenue, it was of the opinion that the application of such tax should be extended to dance halls and/or ballrooms where any refreshments were sold, it would have been a very simple matter for it to amend the Internal Revenue Code to accomplish such result.

The latest ruling of the Commissioner of Internal Revenue included in the findings of the trial court in *Geer v. Birmingham, supra*, (p. 216) was issued to Miss Alice McMahan, (March 7, 1947) notifying her that her establishment was not subject to the cabaret tax.

About the same time that the ruling was issued to Miss McMahan, the Commissioner, or his delegate, challenged the correctness of his long standing interpretation of the Regulations promulgated by him relating to Section 1700(e) of the Internal Revenue Code, which had been approved by the Secretary of the Treasury, and the lengthy series of rulings issued by him to Collectors of Internal Revenue, and proprietors of dance halls and ballrooms where refreshments were served, by seeking to collect a cabaret tax from proprietors of dance halls and ballrooms located within a small group of states within the United States, some of whom had previously been advised by him that they were not subject to such tax. These, apparently, were selected as a testing ground.

Since the Commissioner did not publish any notice of his tentative change in his interpretation of the Bureau of Internal Revenue Regulations, it is not known when, or how, the revision was made known to the Collectors of Internal Revenue in those states lying within the boundaries of the 7th and 8th Circuit Court of Appeals.

The authority of the Commissioner to extend the application of Section 1700(e)(1) I. R. C. (1939), as amended, to all dance halls and ballrooms which served food, or refreshments, was contested by the Avalon Amusement Corporation, which case was decided against it. (*Avalon Amusement Corporation v. United States* (D. C. Wis.), 73 Fed. Supp. 328.)

It is, perhaps, unfortunate, that the U. S. District Court, in the *Avalon* case, was not informed that the Commissioner had not made a change in his Regulations interpreting Section 1700(e)(2) I. R. C., which Regulation had been in full force and effect for a long period of years, since such change would have required the approval of the Secretary of the Treasury; also, that the proposed change in his interpretation was not published in the Internal Revenue Bulletin Service. Further, that the Court had no knowledge of the many rulings which he had issued to taxpayers operating ballroom and dance hall establishments conducted in a manner similar to that of the plaintiff, to, and including March 7, 1947, informing them that they were not subject to tax as cabarets, roof gardens, or similar places.

Likewise the Court was without the benefit of a complete history of the "cabaret tax" legislation, or a discussion of the generally accepted meaning of the words "cabaret" and "dance hall," and the distinctions recognized between the two types of establishments, such as was developed in the latter case of *Geer, et al. v. Birmingham*, 88 Fed Supp. 189, pp. 195-215, incl.

- (3) The Cabaret Tax Was Not Imposed as a Direct Tax on the Proprietor or Owner of a Cabaret, Roof Garden, or Similar Place. Under the Provisions of the Internal Revenue Code He Was Charged With the Duty of Returning All Payments of Such Taxes Received by Him. When the Commissioner of Internal Revenue, or His Delegate, by Issuing a Letter in January, 1951, Informing All Collectors of Internal Revenue of the Change in His Interpretation of Section 1700(e), Internal Revenue Code (1939), as Amended, Declared That Such Ruling Should Be Applied Retroactively, He Penalized All Owners and Proprietors of Dance Halls, and Ballrooms, Similar to That Operated by the Taxpayer (Appellant), Who Had Failed to Collect a Cabaret Tax From Their Patrons, Because of Their Reliance Upon the Commissioner's Long Standing Interpretation of the Intent and Purpose of Congress, Under Which He Had Declared That No Cabaret Tax Was Due From Them.

The legislative history of Section 1700(e) of the Internal Revenue Code, (1939) as amended, clearly discloses that it was the intent and purpose of Congress, in enacting the statute, that the cabaret tax should be paid by the patron of the cabaret, roof garden, or similar place.

Because of the administrative difficulties which developed with respect to enforcing collection of the cabaret tax, Congress changed the law as follows:

Section 542 of the Revenue Act of 1941 revised the base of the present "cabaret" tax. Liability for the tax was imposed on the proprietor. The Report of the Senate Finance Committee contains the following statement with respect to the amendment:

"The amendment merely shifts the legal incidence of the tax from the patron to the proprietor and

makes the proprietor primarily liable for the payment of the tax to the Government. There is nothing in the section which would prevent the taxpayer, the proprietor, from shifting the tax burden to his customer."

The Commissioner has recognized this, and in his instructions to Collectors of Internal Revenue, issued September 26, 1941, and published as Com. Mimeograph 5255, in Internal Revenue Bulletin 1941-2, page 260, said:

"This tax is not required to be collected from the patron, as heretofore, but there is no objection to the cabaret, etc. passing it on to the patron if billed separately and in the exact amount. (Section 542 effected these changes.)"

Under date of January 19, 1951, about three years after the Circuit Court of Appeals, 7th Circuit, had sustained the Government in the case of *Avalon Amusement Corporation*, the Deputy Commissioner of Internal Revenue, Charles J. Valaer, wrote to all Collectors of Internal Revenue to enforce the cabaret tax against dance hall operators. The letter reads, in part, as follows:

"Subsequent to the decision in the Avalon case it was the position of the Bureau that any dance hall which sold food or refreshments is liable for the cabaret tax and rulings have been to that effect. However, because of the fairly apparent indications that the decision in the Avalon case would be tested in further litigation, no action was taken by the office to publicize such position of the Bureau or to notify dance halls generally of their liability for the cabaret tax, except in response to specific requests for rulings. In view of the concurring court decision in the Geer case, it is now believed advisable to publicize the Bureau's position on this matter."

Deputy Commissioner Valaer's letter, from which the above quotation is taken, was not published in the Internal Revenue Cumulative Bulletin for 1951, probably because about 17 days thereafter, and on February 5, 1951, the House Ways and Means Committee met to consider the bill which was to be known as the Revenue Act of 1951.

The Circuit Court of Appeals, 3rd Circuit, in its opinion rendered in the case of *The Lesavoy Foundation v. Commissioner*, 238 F. 2d 589 (1957), stated (p. 591) that:

"We quite realize that the Commissioner may change his mind when he believes he has made a mistake in a matter of fact or law. Our own decision in *Keystone Automobile Club v. Commissioner*, 181 Fed (2d) 402 (3d Cir. 1950) recognizes this point fully and that point is sustained by abundant authority. But it is quite a different matter to say that having once changed his mind the Commissioner may arbitrarily and without limit have the effect of that change go back over previous years during which the taxpayer operated under the previous ruling."

It is certain that the proprietors of cabarets, roof gardens, and similar places, since they were to be held liable for the collection of the cabaret tax, in any event, took steps to collect the tax from their patrons, in order to avoid being penalized for failing to do so.

The operators of ballrooms and dance halls, in most instances, were not in as fortunate position, since having relied upon the Commissioner's Excise Tax Regulations, and/or his rulings, they did not collect a cabaret tax from their patrons, and were severely penalized when demand was made upon them, and a tax exacted equal to the amount which it was held they should have collected, even though the Commissioner had never published a notice of the change in his interpretation of his Regulations which had been in force for a long period of years.

The trial court has referred to the case of *Automobile Club of Michigan v. Commissioner*, 353 U. S. 180; 77 S. Ct. 707, with respect to the authority of the Commissioner to make his rulings retroactive.

It is clearly inapplicable to the instant case.

In the case of *Automobile Club of Michigan, supra*, the taxpayer did not deny that it was not entitled to exemption from the payment of Federal income taxes, under a reasonable interpretation of the statute, but contended that the Commissioner was without authority to apply the change in his ruling retroactively:

The Commissioner had ruled in 1934, and in 1938, that the taxpayer was entitled to exemption from Federal income taxes, as a social club. In 1945 he again reviewed the facts and determined that his former rulings had been incorrect. As a result, he revoked the ruling, and made such revocation retroactive to the years 1943 and 1944.

It was found by the Court that the action of the Commissioner resulted from a General Counsel's Memorandum (G. C. M. 23688) published in *Cumulative Bulletin 1943, at page 283*) interpreting Section 101(9), I. R. C. (1939) to be inapplicable to organizations similar to that of the Automobile Club of Michigan. The Commissioner adopted the General Counsel's interpretation and proceeded to apply it, effective from 1943, *indiscriminately to automobile clubs*.

The Court, in its opinion, (p. 185) observed that the Regulations in the *Automobile Club of Michigan* case in no wise purported to determine whether any organization was, or was not exempt. And that:

"These Regulations did not provide the exemption, or interpret Section 101(9) but merely specified the necessary information required to be filed in order that the Commissioner might rule whether or not the taxpayer was entitled to exemption. This is not a

case of an administrative construction embodied in the regulations which, by repeated reenactment of Section 101(9) * * * Congress must be taken to have approved * * * and thereby to have given the force of law. *Helvering v. Reynolds*, 306 U. S. at 114, 115.”

In the instant case the taxpayer, having relied on the Commissioner’s published regulations, was severely penalized when he was required to pay the taxes out of his own pocket [Tr. of R. p. 36] long after the possibility of collecting the taxes from his customers had passed.

(4) The Commissioner Has Not Published in His Internal Revenue Bulletins or His Cumulative Bulletins Any Change in the Regulations Promulgated by Him Under the Provisions of the Internal Revenue Act of 1941, Setting Forth His Interpretation of Section 1700(e) of the Internal Revenue Code of 1939, as Amended by the Revenue Act of 1941.

The Internal Revenue Bulletins are the official publications of the U. S. Treasury Department, and the Bureau of Internal Revenue. They are issued at regular intervals throughout the year, and their contents consolidated in what are designated Cumulative Bulletins which cover a period of six months, or twelve months, depending upon the volume of matter to be included.

Each of such Cumulative Bulletins contains the following paragraphs:

“Internal Revenue Bulletin (Period covered by the particular bulletin) in addition to all decisions of the Treasury Department (called Treasury Decisions) pertaining to Internal Revenue matters, contains opinions of the Chief Counsel for the Bureau of Internal Revenue, rulings and decisions pertaining to income,

estate, sales, excess profits, employment, social security, and miscellaneous* taxes and legislation affecting the revenue statutes, as indicated on the title page of this Bulletin * * *.

“The rulings reported in the Internal Revenue Bulletin are for the information of taxpayers and their counsel as showing the trend of official opinion in the administration of the Bureau of Internal Revenue; the rulings other than Treasury Decisions have none of the force or effect of Treasury Decisions and do not commit the Department to any interpretation of law which has not been formally approved and promulgated by the Secretary of the Treasury * * *.

“It is also the policy of the Bureau to publish all rulings or decisions which revoke, modify, amend, or effect in any manner whatsoever any published ruling or decision. * * * No unpublished ruling or decision will be cited or relied upon by any officer or employee of the Bureau as a precedent in the disposition of other cases.”

Viewed in the light of the above-quoted paragraphs from the Internal Revenue Bulletin, it would appear evident that the Commissioner's tentative change in his interpretation of the Regulations which Regulations had been approved by the Secretary of the Treasury, published, and continued in force for a long period of years, without change, had not received the approval of the Secretary of the Treasury, and clearly did not have the force and effect of a Regulation, or even a published ruling.

Notwithstanding the instructions given to officers and employees of the Bureau with respect to citing, or relying upon, unpublished rulings or decisions, it seems to be clear

*Cabaret tax and admissions tax come under this heading.

that both the Bureau officials, and the Court relied upon an unpublished ruling which had been declared to only a very small portion of the Bureau of Internal Revenue personnel.

Upon appeal to the Circuit Court of Appeals for the 7th Circuit, the decision of the U. S. District Court in *Avalon Amusement Corporation v. United States*, *supra*, was affirmed. 165 F. 2d 653 (January 28, 1948). In that case the Court declared that "An establishment charging admission for dancing privileges and where refreshments are sold in connection therewith is a 'roof garden, cabaret, or similar place.' "

The courts may look to the history of the Legislature upon the subject of which the statute treats . . . to determine the purpose that the Government sought to accomplish. (*Church of the Holy Trinity v. United States*, 143 U. S. 457; *Crosset Western Co. v. Commissioner, Circuit Court of Appeals, 3rd Circuit*, 155 F. 2d 433.)

Statutes levying taxes are not extended by implication beyond the clear import of the language used, and in the case of doubt are construed most strongly against the Government. (*Hecht v. Malley*, 265 U. S. 144 at p. 156; 44 S. Ct. 462 (p. 156).)

There is no reason requiring a statute imposing special internal revenue taxes to be construed liberally in favor of the Government, but it should be construed fairly and judicially with reference to both parties. (*De Bary v. Souer*, Cir. Ct. of Ap., 5th Cir., 101 Fed. 425, at p. 428.)

The literal meaning of words employed in statutes levying taxes is most important; for such statutes are not to be extended beyond the clear import of the language used.

* * * Where the words in a statute levying taxes are doubtful, the doubt must be resolved in favor of the taxpayer. (*United States v. Merriam*, 269 U. S. 179 at pp. 187-188, 44 S. Ct. 69.)

On January 10, 1950, the U. S. District Court, for the northern district of Iowa, handed down its decision in the case of *Geer, et al. v. Birmingham*, 88 Fed. Supp. 189, which was the second time the courts were called upon to review the effects of the Commissioner's unpublished change in his interpretation of his outstanding Regulation. This case was decided in favor of the taxpayer, and against the Government.

In the *Geer* case, *supra*, (pp. 195-215) the District Court Judge carefully reviewed the history of the "cabaret tax" legislation commencing with the year 1917; the generally accepted meaning of the words "cabaret" and "dance hall" or "ballroom", and the distinguishing features of these establishments. Also, the Commissioner's Regulations promulgated under the provisions of the Revenue Act of 1941, and continued without change for a long period of years.

He distinguished the case of *Avalon Amusement Corporation, supra*, on the ground, among others, that the Court, in that case, was not informed of the facts with respect to the Regulations of the Commissioner of Internal Revenue which had long been in force and effect, and knew only of the very recent tentative change in the Commissioner's position, which, at that date, had not been publicized (pp. 228-229).

Uncontradicted testimony was introduced in the trial of the *Geer* case (p. 220) to the effect that Collectors of Internal Revenue in the nearby states of Illinois, Minnesota, and Kansas were not demanding, or collecting a cabaret tax from the operators of dance halls and ballrooms. The Trial Court commented that the collection of Federal excise tax is not a matter of "local option." It called attention to the fact that the record did not show "that the Commissioner of Internal Revenue, or the Deputy Commissioner of Internal Revenue has, as yet, given

notice over the signatures of either of them” that a change was being made in the interpretative rulings and administrative practice that had been followed for a long period of time in regard to the liability of operators of ballrooms of the type and kind operated by the plaintiffs, for the so-called cabaret tax.

The decision of the District Court in *Geer, et al. v. Birmingham, supra*, is deemed to be of considerable importance for the reason that the House Ways and Means Committee, and the Senate Finance Committee, in their respective reports on the Revenue Act of 1951, make specific reference to that decision and state that it correctly reflected the intent and purpose of Congress in enacting the “cabaret tax” legislation.

Upon appeal by the Government, the Circuit Court of Appeals, 8th Circuit, reversed the decision of the District Court in *Geer, et al. v. Birmingham, supra*, (*Birmingham v. Geer, et al.*, 185 F. 2d 82; November 10, 1950), and followed the decision of the Circuit Court of Appeals, 7th Circuit, in *Avalon Amusement Corporation v. United States*.

Nothing has been found in the Circuit Court’s decision in *Birmingham v. Geer, et al., supra*, which would indicate that any consideration was given to the long line of decisions of the courts holding that reenactment by Congress, without change, of a statute which had previously received long-continued executive construction is an adoption by Congress of such construction, unless the contrary is clearly indicated. (*Lykes v. United States*, 343 U. S. 118, p. 127, and cases cited therein; *Helvering v. Winmill*, 305 U. S. 79; *Swigert v. Baker*, 229 U. S. 187; *Commissioner v. Pittsburgh & West Virginia R. R. Co.* (U. S. C. C. A. 3d Cir.), 172 F. 2d 1010; *Oil Shares, Inc.*, 29 B. T. A. 664.)

And in *Brewster v. Gage*, 280 U. S. 325, at page 336, the same court said:

“It is the settled rule that the practical interpretation of an ambiguous or doubtful statute that has been acted upon by officials charged with its administration will not be disturbed except for weighty reason.” (P. 336) Also, that “A reversal of that construction would be likely to produce inconvenience and result in inequality.” (P. 336.)

The case of *Helvering v. Bliss*, 293 U. S. 141, at page 151, presented the question whether deductions on account of charitable contributions are to be taken from net income as defined by Section 21, or from ordinary net income as defined by Section 101(c)(7) of the Revenue Act of 1928. The Commissioner of Internal Revenue had ruled that the taxpayer (respondent), in computing the 15% deduction allowable for charitable contributions, could not use the amount of net income as defined by Section 21 but was limited to the amount of ordinary net income which excluded net capital gains. In affirming the decision of the Circuit Court of Appeals, 2d Circuit, the Supreme Court said:

“Moreover, from 1923 to 1932 the Commissioner uniformly ruled that the deduction for charitable contributions was to be taken from net income before computation of the tax and hence in whole from ordinary net income. The reenactment in later Acts of the section permitting the deduction indicated Congressional approval of this administrative interpretation,”

To the same effect: *Old Colony Trust Co. v. Comm.*, 301 U. S. 379, at page 384.

In the case of *Helvering v. Reynolds Tobacco Co.*, 306 U. S. 110, at page 116, the question presented to the

court was whether an amendment to the Regulations adopted by the Treasury Department on May 2, 1934, could be applied retroactively to the year 1929. The court held that the respondent's tax liability for the year 1929 is to be determined in conformity to the regulation then in force. After making reference to Section 605 of the Revenue Act of 1928, which section is substantially similar to Section 3791(b) of the Internal Revenue Code, (1939) relating to the retroactivity of regulations or rulings, the Court said:

“It is clear from this provision that Congress intended to give to the Treasury power to correct misinterpretations, inaccuracies, or omissions in the regulations and thereby to affect cases in which the taxpayer's liability had not been finally determined, unless in the judgment of the Treasury, some good reason required that such alterations operate only prospectively. The question is whether the granted power may be exercised in an instance where, by repeated reenactment of the statute, Congress has given its sanction to the existing regulation.

“Since the legislative approval of existing regulations by reenactment of the statutory provision to which they appertain gives such regulations the force of law, we think that Congress did not intend to authorize the Treasury to repeal the rule of law that existed during the period for which the tax is imposed. We need not now determine whether, as has been suggested, the alteration of the existing rule, even for the future, requires a legislative declaration or may be shown by reenactment of the statute unaltered after a change in the applicable regulation.”

Under the published Regulation of the Commissioner, which Regulation had been approved by the Secretary of the Treasury, and was in force and effect during the

taxable years involved herein, the Appellant's establishment was not taxable as a cabaret. (*Geer et al. v. Birmingham, supra.*)

In the case of *Keystone v. Automobile Club v. Commissioner*, 181 F. 2d 402, the Circuit Court, in its opinion, stated that:

"The Commissioner urges upon us that these regulations are higher in the administrative hierarchy than memoranda coming from his office."

The basis for the reversal of the decision of the U. S. District Court in *Geer, et al. v. Birmingham*, by the 8th Circuit Court of Appeals (*Birmingham v. Geer, et al., supra*), is believed to be found in the following paragraph contained in the Court's decision, (p. 85):

"It is important that, so far as possible and particularly with respect to questions affecting the administration of taxing statutes, there should be uniformity of decisions among the circuits. We would not be justified in refusing to follow the decision of the Circuit Court of Appeals in the Avalon case unless convinced that it was clearly wrong." (Citing cases.)

The Committee reports of the House Ways and Means Committee and the Senate Finance Committee, on the bill, which was later enacted as the Revenue Act of 1951, contains the clearly worded statement that the decisions of the Circuit Court of Appeals, 7th Circuit, in the case of *Avalon Amusement Corporation, supra*, and that of the Circuit Court of Appeals, 8th Circuit, in *Birmingham v. Geer, et al., supra*, did not reflect the intent and purpose of Congress in enacting the cabaret taxing statute.

- (5) Congress, Speaking Through the Members of the House Ways and Means Committee on the Revenue Act of 1950 and Speaking Through the Members of the House Ways and Means Committee and the Senate Finance Committee, on the Revenue Act of 1951, Declared That It Was Its Intent and Purpose in the Passage of Section 1700(e) of the Revenue Code of 1939, as Amended in 1941, That Dance Halls and Ballrooms Similar to That Conducted by the Taxpayer Were Not Included Within the Meaning of the Term "Roof Garden, Cabaret, or Similar Place."

Subsequent to the decision of the U. S. District Court in the case of *Geer, et al. v. Birmingham, supra*, representatives of the National Ballroom Operators Association personally appeared before the Committee on Ways and Means of the House of Representatives, which then was considering HR 8920 of the 81st Congress, 2nd Session, which became the *Revenue Act of 1950*.

After making a brief oral statement they submitted a written memorandum requesting that the statute imposing a tax on cabarets be clarified to confirm that it was the intent of Congress to exclude ballrooms and dance halls from classification as cabarets, or similar places which were subject to the cabaret tax, because of the decision of the court in *Avalon Amusement Corporation, Inc. v. Commissioner, supra*. The case of *Geer, et al. v. Birmingham, supra*, was cited as a correct interpretation of the intent and purpose of Congress in enacting the legislation involved.

Apparently in accordance with this request, HR 8920 revised Section 1700(e) to provide that:

"In no case shall such term include any ballroom, dance hall, or other similar place where the serving or selling of food, refreshment, or merchandise is

merely incidental, unless such place would be considered, without the application of the preceding sentence, as a 'roof garden, cabaret, or other similar place.' ”

The Report of the House Ways and Means Committee (Internal Revenue Cumulative Bulletin 1950-2 p. 432), insofar as it relates to this change in the wording of the statute, reads:

“The purpose of this amendment is to make it clear that the principles set forth in the case of *Geer v. Birmingham*, Collector of Internal Revenue, United States District Court, Northern District of Iowa, decided January 10, 1950, are controlling in the determination of whether an establishment is operating as a cabaret or a dance hall, and to avoid the broad construction placed upon the statute in the case of *Avalon Amusement Corp., v. U. S.* (165 Fed. (2d) 653) which requires that dance halls and similar establishments be taxed as cabarets, even though the serving or selling of food, refreshments, or merchandise, is merely incidental.”

After HR 8920 passed the House of Representatives it went to the Finance Committee of the U. S. Senate, where it was being considered at the time the Korean war broke out. There is little doubt that the change made in the wording of the statute by the House of Representatives would have been adopted by the Senate, and become the declaration of Congress at that time, but for the emergency.

It is unfortunate that the Senate Finance Committee, because of the Korean war situation, put aside the consideration of this provision of the House bill, acting on

the erroneous assumption that, at the administration's request, it was shelving legislation granting relief from excise tax inequities, whereas, in fact, the relief sought was not relief from an excise tax inequity, but merely a confirmation of what had always been the intent of Congress as shown by the legislative history of Section 1700(a) of the Internal Revenue Code, which history is set forth in detail in Judge Graven's opinion in the case of *Geer, et al. v. Birmingham, supra*, pages 195 to 215.

When the Revenue Bill of 1951 was presented to the House Ways and Means Committee, in February, 1951, the same representatives of the National Ballroom Operator's Association again appeared before the Committee, and submitted a new written statement setting forth the history of the action taken on their request by the House, in the Revenue Bill of 1950, and the failure of the Senate to act thereon and the reasons for such failure.

They presented to the Committee notices received from a substantial number of operators of dance halls and ballrooms in the middle western area, stating that they were closing up their establishments because of the imposition of a cabaret tax which made it impossible for them to operate. Many of the dance halls had been converted for use in other lines of business.

The House of Representatives again revised Section 1700(e)(1) of the Internal Revenue Code in order to declare, with greater certainty, the intent and purpose of Congress in enacting the said statute.

The published records of the hearing disclose that Secretary of the Treasury Snyder was the first witness

called to testify before the Committee with respect to taxation problems. The attitude of the Committee, insofar as excise taxes are concerned, may be judged from the following statement made by Mr. Dingell, a member of the Committee, to the Secretary:

“* * * I am bitterly opposed to any further excises, spreading the basis to include any more, or levying any additional taxes on those who are now paying them; * * *.”

The Report of the House Ways and Means Committee contains the following comment on Section 404 of the Revenue Act of 1951:

“Section 404 of your Committee Bill relates to the application of the 20% tax on cabarets to ballrooms and dancing halls. Some courts have construed the cabaret tax to apply in the case of ballrooms and dancing halls merely because it was possible to purchase incidental refreshments, services, or merchandise in such places. This bill amends Section 1700(e) of the Code to provide that the cabaret tax shall not apply in such cases. It is estimated that the revenue effect of this provision will be negligible.

“This section amends Section 1700(e)(1) of the Internal Revenue Code to exempt from the cabaret tax bona fide dance halls, ballrooms, and other similar places where the serving or selling of food, refreshments, or merchandise is merely incidental to the music and dancing privileges furnished unless the conduct of the place is such as to bring it within the normal concept of a roof garden, cabaret, or similar place. * * *

“The purpose of this amendment is to make it clear that the principles set forth by the District Court in

the case of *Geer v. Birmingham* (88 Fed. Supp. 189) are controlling in the determination of whether the establishment involved is operating as a cabaret or as a dance hall, and to avoid the broad construction placed upon the statute in the case of *Avalon Amusement Corporation v. United States* (165 Fed. (2d) 653, and in the Court of Appeals decision reversing the decision of the District Court in the *Geer* case (*Birmingham v. Geer*, 185 Fed. (2d) 82) which require that dance halls and similar establishments be taxed as cabarets, even though the serving or selling of food, refreshments, or merchandise is merely incidental.”

Section 404 of the Revenue Act of 1951 reads:

“(a) Ballrooms and dance halls.—Section 1700(e) (1) (relating to tax on cabarets, roof gardens, etc.) is hereby amended by inserting after the second sentence thereof the following new sentence: ‘In no case shall such term include any ballroom, dance hall or other similar place where the selling of food, refreshment, or merchandise is merely incidental, unless such place would be considered, without the application of the preceding sentence, as a roof garden, cabaret, or other similar place.’ ”

In *Penn Mutual Life Ins. Co. v. Lederer*, 247 Fed. 559, at page 561, the court said:

“It is the American doctrine that the people govern themselves, and a vital part of that principle is that they, and they only, tax themselves. No tax can in consequence be imposed except by their representatives in Congress, and a further negative consequence is that no tax can be imposed by the courts or the executive, through judicial or administrative construction of the statutes.”

(6) The Action of the Congress in Relation to Said Section 1700(e) Was Not a Change or Amendment of the Law as Set Forth in Said Section, but Was Merely a Declaration and Clarification of the Existing Law.

Some confusion apparently has arisen with respect to the effect to be given to Section 404 of the Revenue Act of 1951, by reason of the following statement regarding its effective date:

“The amendment made by this section shall take effect at 10 A.M., on the first day of the first month which begins ten days after the enactment of this bill.”

After having declared that it was not the intent and purpose of Congress to apply the cabaret tax in the case of ballrooms and dancing halls merely because it was possible to purchase incidental refreshments, services, or merchandise at such places, it is very evident that Congress was not declaring a new policy, but only providing a more clearly defined expression of the purpose and intent of the prior law.

The statement made in the Report of the House Ways and Means Committee that: “It is estimated that the revenue effect of this provision will be negligible” would seem to have been based on the understanding that the cabaret tax had been collected only from ballrooms and dance halls located within the respective districts of the Seventh and Eighth Circuit Courts of Appeals, since it is obvious that were such taxes to be applied to all ballrooms and dance halls within the United States, in accordance with the ruling issued over the signature of Deputy Commissioner Valaer, under date of January 19, 1951, and, as has been done in the instant case, collected for years prior to the release of that letter ruling, the increase

in revenue could reasonably be expected to amount to much more than double the tax then being collected from cabarets, roof gardens, and similar places.

In the case of *Jordan v. Roche*, 228 U. S. 436, the following question was certified to the U. S. Supreme Court: Was bay rum imported from Porto Rico subsequent to the passage of the Act of April 12, 1900, and prior to the passage of the act of February 4, 1909, subject to the payment of a tax equal to the Internal Revenue tax imposed in the United States under Sections 3248 and 3254 on "distilled spirits, alcohol and alcoholic spirit?"

Prior to the 1909 Act, the Court of Appeals for the Second Circuit had answered this question in the negative. (*Anderson v. Newhall*, 161 Fed. 906.) But when the same exact question arose in litigation occurring after the 1909 Act, the Court of Appeals for the Second Circuit was somewhat uncertain about its prior decision. It certified the question to the Supreme Court.

Mr. Justice McKenna, in his opinion, said:

"It is insisted that this act is a declaration by Congress that bay rum was not subject to tax under prior statutes. The history of the act rejects the contention and manifests that the act was passed in consequence of the decision in *Newhall v. Anderson*, and other decisions to which we have referred. The law was not the declaration of a new policy but a more explicit expression of the purpose of the prior law made necessary by judicial construction of that law."

The question whether an amendment made by Congress to an existing statute was effective only from the date of adoption of such amendment or was merely declaratory of the prior law was again presented to the U. S. Su-

preme Court in the case of *Commissioner v. Estate of Harry Holmes*, 66 S. Ct. 257 (Jan. 2, 1946). The Circuit Court of Appeals, Fifth Circuit, and the Tax Court of the United States had held that the amendment made a substantial change in the law.

The Supreme Court found, as a fact (pp. 482-483) that:

"In 1936, immediately following the White decision, Congress revised Section 302(d) by rewriting it into two separate paragraphs relating to 'revocable transfers,' one applying to transfers after June 22, 1936, the other to transfers on or prior to that date . . . For present purposes the difference claimed to be important consisted in charging the phrase 'to alter, amend, or revoke' applying to transfers on or prior to June 22, 1936, so that in Section 811(d)(1) it reads 'to alter, amend, revoke, or *terminate*,' as to transfers after that date.

"However, Section 811(d)(2) governs the transfer in this case since it was made in January, 1935, prior to the dividing date. And the question most mooted has been whether the change was one of substance or was only a clarifying amendment . . ."

The Report of the House Ways and Means Committee with respect to the amendment involved in the *Holmes* case as quoted therein (p. 488) reads as follows:

"Another change made in subsection (a) of Section 206 has been to expressly include a power to terminate along with the powers to alter, amend or revoke. In the case of *White v. Poor*, *supra*, the Supreme Court did not pass on the question whether the power to terminate was included in the language relating to a 'power to alter, amend, or revoke.' Since in substance a power to terminate is the equivalent

of a power to revoke, this question should be set at rest. Express provision to that effect has been made and it is believed that it is declaratory of existing law."

In answer to the taxpayer's contention that the said amendment was effective only from the date of its adoption, the Supreme Court said (p. 487):

"We think the history gives the opposite story. The 1936 revision resulted from the White decision which raised doubt whether Congress had included the power to terminate in the words 'alter, amend, or revoke.' To clarify the matter Congress removed all doubt for the future by enacting Section 811(d)(1). At the same time it adopted Section 811(d)(2) which retained the earlier phrasing. This was from concern that retroactive application of Section 811(d)(1) should not impose taxes on prior transfers not comprehended by the prior law, as the concluding sentence of Section 811(d)(2) shows. Notwithstanding this and the doubt created by *White v. Poor*, *supra*, the Report of the Committee on Ways and Means of the House of Representatives expressly states that the addition of 'or terminate' in Section 811(d)(1) was 'declaratory of existing law.'"

Since the House Ways and Means Committee and the Senate Finance Committee, in their respective reports on the Revenue Bill of 1951 declared that the decision of the U. S. District Court in *Geer, et al. v. Birmingham*, *supra*, correctly reflected their intent and purpose in enacting the statute imposing a tax on cabarets, roof gardens, and similar places, the only reason for Congress to make a change in the prior law was to make more explicit its original intention to exclude ballrooms and dance halls from being subject to a cabaret tax, unless such place

would be considered to be a cabaret, roof garden, or similar place.

As the Supreme Court found in the cases of *Jordan v. Roche*, *supra* (pp. 445-446), and *Commissioner v. Estate of Harry Holmes*, *supra*, Congress deemed it advisable to change the language of the statute because the judicial construction of the statute imposing a tax on cabarets, by the Circuit Court of Appeals, 7th Circuit, in the case of *Avalon Amusement Corporation*; and by the Circuit Court of Appeals, 8th Circuit, in *Birmingham v. Geer, et al*, did not reflect its intent and purpose.

Following the enactment of the Revenue Act of 1951, the Commissioner of Internal Revenue has agreed that the appellant is not subject to the excise taxes (cabaret) complained of in this proceeding.

In the case of *Peony Park, Inc. v. O'Malley*, 121 Fed. Supp. 690 (p. 692) (June 10, 1954) (U. S. D. C., District of Nebraska), the taxpayers contended that the so-called "amendment" made by Section 404 of the Internal Revenue Act of 1951 to Section 1700(e)(1) of the Internal Revenue Code of 1939, as amended, was merely declaratory of the existing law.

The Court, in that case (pp. 694-695), found that notice of the Commissioner's change in his interpretation of the Regulations was given to taxpayers in the State of Nebraska, about September 1, 1948, and cabaret taxes were collected thereafter.

The Court (p. 694) referred to letters sent to various Collectors of Internal Revenue by the Deputy Commissioner, on January 19, 1951, advising them that as a result of the decision in *Birmingham v. Geer, supra*, arrangements should be made to notify all dance halls and ball-rooms, in which food and refreshments are sold during the time music and dancing privileges are furnished is a

“roof garden, cabaret, or other similar place.” Most of the notices were found by the Court to have advised the taxpayers of their liability effective February 1, 1951. The Court then said (p. 695):

“In other words, the Commissioner adopted the policy in many states of collecting the tax only for periods after February 1, 1951, while in Nebraska he adopted a policy of collecting the tax as far back as 1948.”

Counsel for the taxpayers relied upon the case of *Jordan v. Roche*, *supra*, and the trial court made the following comment with respect to its applicability (p. 694):

“The case is in point except for one rather important factor. This is not the Supreme Court; nor is it the Court of Appeals. The Court of Appeals may entertain doubts as to the correctness of its previous decisions. It may even overrule them if it so desires. But this court may not. It must follow with humble respect the decisions announced by the Court of Appeals in *this* circuit.”

The District Court, in deciding the case in favor of the Government did not discuss the question whether the amendment was an expression of a new policy, or merely a declaration of the existing law, but ruled (p. 693), that the amendment was not retroactive, citing Sutherland, *Statutory Construction* (3rd Ed. by Horack).

“The usual purpose of a special interpretive statute is to correct a judicial interpretation of a prior law which the Legislature determines to be inaccurate. Where such statutes are given any effect, the effect is prospective only.” (Citing *United States v. Gilmore*, 8 Wall. (75 U. S.) 330.)

It may, or may not, be significant that the U. S. Supreme Court, in deciding that the “special interpretive

statutes” to correct judicial interpretations determined by the Legislature to be inaccurate, which were under consideration in the cases of *Jordan v. Roche, supra*, and *Commissioner v. Estate of Harry Holmes, supra*, were merely declaratory of the existing law, failed to comment on the pronouncement of Sutherland on the subject of Statutory Construction, although its decisions were in direct conflict with the views expressed by him.

Upon appeal to the Circuit Court of Appeals, 8th Circuit, that court attempted to distinguish the case of *Jordan v. Roche, supra*, by stating (p. 672) that:

“In the *Jordan* case the Supreme Court disagreed with the prior circuit court decisions which induced the amendment. In the present cases the amendment was intended to change the law as interpreted by the Courts of Appeals of this Circuit and Seventh Circuit. There has been no Supreme Court determination that the interpretations made in the *Geer* and *Avalon* cases are erroneous. Consequently, in our present cases, the amendment changes rather than clarifies the prior statute.”

The language of the House Ways and Means Committee, and the Senate Finance Committee clearly shows that the said amendment was intended to declare the interpretations of the Courts of Appeals of the 7th and the 8th Circuits to be erroneous, and that they did not reflect the intent and purpose of Congress in enacting the prior law.

While it is true that there has been no Supreme Court determination that the interpretations made by the Circuit Courts of Appeals in the *Avalon* and *Geer* cases are erroneous, the Supreme Court has declared that the primary rule of construction is to ascertain and give effect to the will and intent of Congress. (*United States v. Rosenblum Truck lines*, 315 U. S. 50, at p. 53 to 55, incl.)

The intention of the lawmaker controls in the construction of taxing statutes as it does in the construction of other statutes. (*Helvering v. Stockholders Enskilda Bank*, 293 U. S. 84, 55 S. Ct. 50.)

Expressions of opinion expressed by a Congressional Committee which have discussed an act of Congress in a report are entitled to weight in construing the law. (*Penn Mutual Life Insurance Co. v. Lederer*, 247 Fed. 559 (Circuit Court of Appeals, 3rd Circuit), affirmed 252 U. S. 523.)

And the Supreme Court has held it to be reversible error to refuse to consider the Congressional Committee Reports as an aid in ascertaining the intent of Congress. (*Harrison v. Northern Trust Co.*, 317 U. S. 476, p. 480.)

Had the Supreme Court seen fit to review the case of *Birmingham v. Geer, et al.*, in the light of the House Ways and Means Committee Reports on the Revenue Bills of 1950 and 1951, there is no reason to believe that it would have refused to consider the Reports as an aid in ascertaining the purpose and intent of Congress in enacting the law providing for a tax on cabarets, roof gardens, and similar places.

In its opinion rendered in the case of *Peony Park, Inc., supra*, the Circuit Court discusses the case of *Harrison v. Northern Trust Co.*, 317 U. S. 476, which holds that the legislative history of an act should be examined. It is believed that a careful reading of the Supreme Court's decision in that case, and the Report of the House Ways and Means Committee on the Revenue Bill of 1932, could reasonably lead to different conclusions than those expressed by the Circuit Court.

That Congress, in enacting Section 807 of the Revenue Act of 1932, which was involved in *Harrison v. Northern Trust Co.*, *supra* (p. 480), intended to, and did, in fact

change the law is clearly evident from the following extracts from the Report of the House Ways and Means Committee relating to Section 807.

“The purpose of this amendment is to limit the deduction for charitable bequests, etc., to the amount which the decedent has in fact and in law devised or bequeathed to charity.

“Under the existing law, most absurd results are reached. Thus, if a testator gives his residuary estate to charity and directs that the Federal estate tax and the State inheritance taxes shall be paid out of such estate, the result may be that nothing is left for charity. In such case, notwithstanding nothing is given to charity and charity receives nothing, still there must be deducted from the gross estate a wholly fictitious sum, namely, that he would have given to charity had he not directed otherwise. * * *

The balance of the Report clearly discloses the great dissimilarity between the legislative history in the *Harri-son* case, *supra*, and that in the *Peony Park, Inc.* cases.

In *Swigert v. Baker*, 229 U. S. 187, at p. 190, the Supreme Court said:

“The well defined principle announced by all the courts and text writers is that prior or subsequent legislation may be resorted to to solve but never to create an ambiguity.”

And at p. 191:

“Reports of committees may be used as an aid to construction, where there is an ambiguity. *Johnson v. Southern Pacific Ry. Co.*, 196 U. S. 20. See also Cong. Record; Vol. 35, pt. 7, pp. 6683.

“While courts have said that resort is not to be had to the debates in legislative bodies to determine

the construction of an act, courts do repeatedly resort to that very source of enlightenment. *Wadsworth v. Boysen*, 148 Fed. Rep. 771; *Binns v. U. S.*, 194 U. S. 486; *Roberts v. Pac. Co.*, 186 Fed. Rep. 938; *Jennison v. Kirk*, 98 U. S. 453; *United States v. Wilson*, 58 Fed. Rep. 768; *Ex parte Farley*, 40 Fed. Rep. 66; *Simonds v. St. Louis, etc.*, 192 Fed. Rep. 353.”

In *Harrison v. Northern Trust Co.*, *supra*, at p. 479, the Supreme Court said:

“The court then followed *Edwards v. Slocum*, 264 U. S. 561, where, under substantially identical facts and in the absence of a statute such as Section 807; the instant issue was decided against the Government. In so doing the court below refused to examine the legislative history of Section 807, on the ground that the section was unambiguous.

“But words are in exact tools at best, and for that reason there is wisely no rule forbidding resort to explanatory legislative history no matter how clear the words may appear on ‘superficial examination.’ *U. S. v. American Trucking Association*, 310 U. S. 534, 543-544. See also *U. S. v. Dickerson*, 310 U. S. 554, 562.”

The trial court [Tr. of R. p. 18] has stated that:

“In the light of these decisions (*Avalon Amusement Corp. v. U. S.*, *supra*, and *Birmingham v. Geer*, *supra*), the decision in the lower court in *Geer v. Birmingham*, D. C. Ia., 1950; 88 Fed. Supp. 189, which was specifically reversed by the Court of Appeals in *Birmingham v. Geer*, *supra*, and the fact that a Committee of the Congress, subsequent to the promulgation of the decisions, may have stated that the lower court’s opinion accords with congressional intent, while those of the Courts of Appeals do not, loses all meaning.”

The Supreme Court has uniformly ruled that the intent of Congress governs the interpretation of a taxing statute. That Court has likewise held that it is reversible error to refuse to consider the Congressional Committee reports to determine the intent of Congress. (*Harrison v. Northern Trust Co.*, *supra*.)

And the Supreme Court has held that prior or subsequent legislation may be resorted to for the purpose of solving an ambiguity. (*Swigert v. Baker*, *supra*, p. 190.)

No authority has been referred to by the trial court which would justify ignoring the expressed intent of Congress in enacting the statutes imposing a cabaret tax, or which grants precedence to the interpretation of a taxing statute by any U. S. Circuit Court of Appeals over such expressed Congressional intent.

The statement of the trial court [Tr. of R. p. 18] that:

“And where the language is clear (p. 21) legislative history before the passage of the Act loses all significance, and attempted legislative interpretation after the passage of the Act carries no weight. (See *Greenwood v. U. S.*, 1956, 350 U. S. 366, 374; *U. S. v. McKesson & Robbins*, 1956, 351 U. S. 305, 315.) The Congress of the United States did make its interpretation of the Section under consideration prevail in the only manner permitted,—namely, by amending it in 1951 so as to specifically exempt from the tax ballrooms, dance halls, or other similar places where the service of food and refreshments are incidental only.”

The Trial Court, in finding the language of the statute involved herein to be clear, appears to have differed, in this respect, from the finding of the 7th Circuit Court of Appeals in *Avalon Amusement Corp. v. United States*, *supra*, and the Commissioner of Internal Revenue.

The House Ways and Means Committee, in its report on the Revenue Act of 1950, and the House Ways and Means Committee and the Senate Finance Committee, in their respective reports on the Revenue Act of 1951, declared their intent and purpose in enacting the legislation involved herein, rather than interpreting their statute which was a function of the Commissioner of Internal Revenue and the courts, save that neither the courts nor the executive, through judicial or administrative construction of the statutes, can impose a tax. (See *Penn Mutual Life Ins. Co. v. Lederer, supra*, p. 561.)

Since regulations promulgated by the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, are for the purpose of interpreting the statutes, it is certain that where the language of the statute is clear, there is no need for interpretative regulations.

In the case of *Avalon Amusement Corp. v. United States, supra*, the U. S. Circuit Court said:

“The provisions of the statute under consideration became effective in its present form October 21, 1942 . . . It is not free from ambiguity. Since the statute is ambiguous in its definition of a roof garden, cabaret, or other similar place, and does not attempt to define a ‘public performance,’ it is a proper subject for an interpretative regulation.”

See history of the law and regulations in *Geer v. Birmingham*, 88 Fed. Supp. 189, at pp. 195 to 215.

The authority for making such regulations is vested in the Commissioner of Internal Revenue; which regulations were issued and continued in effect without change for a long period of years during which time Congress re-enacted Section 1700(e) of the taxing statutes several times without substantial change.

During this period rulings were issued by him under those regulations through the early months of 1947, notify-

ing operators of dance halls and ballrooms similar to that operated by the appellant, that they were not taxable as cabarets, which are in direct conflict with the instructions issued to Collectors of Internal Revenue in a few of the states in the United States some time in 1947, by some delegate of the Commissioner of Internal Revenue below the rank of Deputy Commissioner.

If further evidence is needed as to the doubt which arose in the mind of the Commissioner as to the correct interpretation of Section 1700(e) with respect to taxing dance halls and ballrooms, it can be found in the letter issued to all Commissioners of Internal Revenue under date of January 19, 1951, which was published in the report of *Peony Park v. O'Malley, supra*. In view of this fact, it is clear that there is ample justification for examining the legislative history of the statute and on authority of *Harrison v. Northern Trust Co., supra*, it is reversible error to refuse to consider it.

It is deemed to be of great significance that the Commissioner has never published notice of any change in his regulations, and has not published any ruling attempting to modify those regulations or his interpretation thereof.

In the foreword to all Cumulative Bulletins issued by the Internal Revenue Service, the attention of all officers and employees of the Bureau of Internal Revenue is directed to the instruction that unpublished rulings are not to be relied upon in the settlement of cases.

It is evident that in the cases of *Avalon Amusement Corp. v. United States, supra*, and *Birmingham v. Geer, supra*, the Courts did not have for consideration a published ruling of the Commissioner of Internal Revenue, or, insofar as the record discloses, an unpublished ruling issued over the signature of the Commissioner, or the Deputy Commissioner of Internal Revenue.

The trial court apparently understood that it was being asked to give retroactive effect to the Revenue Act of 1951. Such was not the case. The Court was asked to find that the change in the language of Section 1700(e) of the Internal Revenue Code, by the Revenue Act of 1951, was merely declaratory of the existing law, on authority of *Jordan v. Roche, supra*, and the *Commr. v. Estate of Harry Holmes, supra*; which cases the trial court did not discuss or attempt to distinguish.

Counsel for the Government apparently agrees that the change made in the language of Section 1700(e) I. R. C. by the Revenue Act of 1951, was merely declaratory of the existing law [Tr. of R. p. 53].

The case of *United States v. McKesson & Robbins* (1956), 351 U. S. 305, 315, cited in the trial court [Tr. of R. p. 18] presented to the court the question as to the scope of the exemption from the antitrust laws provided by "fair trade" legislation. No question of the interpretation of a taxing statute was involved. It is held to be clearly inapplicable to the instant case.

The case of *Greenwood v. United States* (1956), 350 U. S. 366, 374, cited in the trial court [Tr. of R. p. 18] involved the construction and constitutional validity of the Act of September 7, 1949; 63 Stat. 686, now codified in 18 U. S. C., Sections 4244-4248; U. S. C. A., Sections 4244-4248, "To provide for the care and custody of insane persons charged with or convicted of offenses against the United States, and for other purposes." A careful study of the court's opinion discloses no statements which might be applicable to the situation in the instant proceedings.

It is too well established to require the citation of cases, that the denial of certiorari in any case by the U. S. Supreme Court does not signify approval of the decision appealed from.

Summary.

(1) The first question to be answered in this case is whether the Appellant's ballroom was a "cabaret," a term which has acquired a well established meaning. The word is defined as a "restaurant which provides entertainment by singers, dancers, etc." In the case of *Geer et al. v. Birmingham, supra*, considerable testimony was given by persons found to be qualified to give opinions as to the difference between a ballroom or dance hall, and a cabaret.

The Court, in the case of *Philadelphia Storage Battery Co. v. Lederer*, 21 F. 2d 320, at p. 321, after stating that tax laws should be intelligible to those who are expected to obey them, said: "This means that the phrases of the law are to be given the meaning they have in the trades concerned. One sometime helpful attitude of mind in the interpretation of statutes is for the reader to get the viewpoint of the legislator."

The Appellant's establishment was a ballroom licensed and operated as such. It was not a restaurant, and the management provided no entertainment by singers, dancers, etc.,—only an orchestra to furnish music for dancing for those who had paid admissions charge on which a Federal admission tax was collected and paid over to the Government. No tables or chairs were provided within the ballroom, and no food or drinks were served or could be brought within such ballroom. Refreshments were available for purchase at prevailing street prices, *if a patron desired to avail himself of this privilege*, in a room adjoining the ballroom but separated therefrom by a partition, save for a relatively small opening which Appellant was required to maintain by order of the Los Angeles Fire Department.

(2) Under the regulations promulgated by the Commissioner of Internal Revenue with the approval of the Secretary of the Treasury, interpreting the provisions of Section 1700(e) of the Revenue Act of 1941, providing for a separate tax on cabarets, which amended Section 1700(e) of the then existing law, the Commissioner construed such statute as not being applicable to dance halls and/or ballrooms conducted in a manner similar to the one involved herein.

Such regulations continued in effect for a long period of years, during which time Congress on several occasions, reenacted the statute presently in controversy without substantial change. Those regulations have not been amended by the Secretary of the Treasury.

(3) The cabaret tax in question was to be collected for the Government by the proprietor of the cabaret who was authorized to pass it on to the patrons; and where such tax was applicable, the proprietors of cabarets did so.

From time to time Collectors of Internal Revenue in a few of the states lying within the area included within the jurisdiction of the 7th and 8th Circuit Courts of Appeals, received advice to collect a cabaret tax from operators of dance halls and/or ballrooms located within their taxing districts, if any refreshments were served. In the case of *Geer et al. v. Birmingham, supra*, the court made a finding that no evidence had been offered to show that instructions to Collectors of Internal Revenue were issued over the signature of the Commissioner of Internal Revenue, or the Deputy Commissioner of Internal Revenue.

Under date of January 19, 1951, a letter over the signature of the Deputy Commissioner was mailed to all Col-

lectors of Internal Revenue throughout the country instructing them to demand payment of the cabaret tax from all ballrooms and/or dance halls which sold refreshments. That letter was not published in the Cumulative Bulletin issued by the Commissioner of Internal Revenue in 1951. Following the receipt of such letter, taxes were demanded from the Appellant and paid under protest from his own funds for years prior to the issuance of such letter. As a result of making such instruction retroactive, and thereby penalizing the appellant who was unable to collect such taxes from his patrons for prior years, it is maintained that the Commissioner exceeded his authority. (See *The Lesavoy Foundation v. Commr.*, *supra*.)

(4) No decision or ruling tending to indicate a change in such regulations has been published by the Commissioner in the Internal Revenue Bulletin issued by the Internal Revenue Service for the benefit of officers and employees of the Bureau of Internal Revenue, tax practitioners generally, and taxpayers generally, announcing a change in the Commissioner's long continued interpretation.

(5) When the Committee on Ways and Means of the House of Representatives, in its report on the Revenue Act of 1950, and its report on the Revenue Act of 1951, and the Senate Finance Committee in its report on the Revenue Act of 1951, declared that it was not the intent and purpose of Congress that dance halls and ballrooms similar to that conducted by the appellant should be taxed as cabarets, such reports were entitled to, and should have been given great consideration by the trial court.

(6) The instant case does not present a situation where the contention is made that an amendment to an existing statute should be declared retroactive. It is maintained that the change in the language of Section 1700(e) I. R. C., by the Revenue Act of 1951, was not intended to be anything other than a declaration and clarification of the intent of Congress in enacting the existing statute imposing a tax on cabarets. It is urged that the decision of the U. S. Supreme Court in the *Estate of Harry Holmes, supra*, is directly in point and should be held to be controlling in the instant proceedings.

Conclusion.

For the foregoing reasons, the judgment of the District Court should be reversed.

Respectfully submitted,

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No. 15709

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

TONY CAMPOS MEJIA,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

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No. 15709

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vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

Jurisdictional Statement.

The government accepts and incorporates herein appellant's Statement of Jurisdiction.

Statement of Facts.

Defendant's arrest and conviction grew out of certain factual transactions occurring on February 20, 1957, which also involved Mejia's co-defendant, Peter Young and others.

The events of February 20, 1957 actually have their beginning on February 18, 1957 when Sergeant Algy F. Landry, a Deputy Sheriff of Los Angeles County, spoke to Peter Young over the telephone. On this occasion Mr. Young stated that Sergeant Landry could buy approxi-

mately 80 pounds of marijuana for \$3500 [R. T.* p. 32, lines 21-24]. Early the next day, however, Mr. Young told Sergeant Landry that he could not make his "contact". Later that evening, Landry and Young agreed over the telephone to consummate the sale—80 pounds of marijuana for \$3500—on the following day, February 20, 1957 [R. T. p. 32, line 24, to p. 33, line 10]. Accordingly, Sergeant Landry and Federal Narcotics Agent Malcolm P. Richards drove to Young's house at 1310 W. Olympic Boulevard to pick up the marijuana. The sale never took place, however, because Peter Young was arrested approximately ten minutes after Landry and Richards arrived [R. T. p. 24, line 17, to p. 25, line 6].

It was prior to and during Young's arrest that appellant Tony Mejia became involved in the narcotics transactions of February 20, 1957. On that date Deputy Sheriff Justin Burley, who was surveilling Peter Young's house on 1310 W. Olympic, with Federal Narcotics Agent Perry and Deputy Sheriff William L. Farrington, [R. T. p. 77, line 23, to p. 78, line 3], observed Young walking near the corner of Olympic and Blaine. Presently, Young was joined by another person, who remained with him for approximately fifteen or twenty minutes. After that amount of time had elapsed, this second person (who was never identified) was picked up by a 1955 blue Plymouth, license number CMF 088, which had been headed west on Olympic Boulevard [R. T. p. 78, lines 11-16]. Deputy Burley identified the driver of this automobile as appellant Tony Mejia [R. T. p. 79, lines 13-16]. The Plymouth then proceeded east on Olympic, turned into an alley, and stopped directly behind 1310 West Olympic (Young's

*Reporter's Transcript hereinafter referred to as R. T.

residence) [R. T. p. 79, lines 3-12]. After waiting approximately thirty seconds, Deputy Burley, Deputy Farrington, and Agent Perry went into the alley after the Plymouth [R. T. p. 79, lines 17-21]. While hidden from view, these officers observed appellant Mejia's companion take a large cardboard box from the Plymouth, carry it into defendant Young's house, and return to Mejia's waiting automobile [R. T. p. 80, lines 7-10; p. 81, lines 18-21]. It was then that the officers drove up behind Mejia's Plymouth and saw appellant Mejia leaning over the front seat "as if to pick up something from the floor in the rear seat." Mejia and his companion spotted Deputy Burley and his fellow officers, however, and sped out of the alley to escape apprehension [R. T. p. 82, lines 4-20]. At this time defendant Peter Young was seen sprinting out the door of his house and down the street, where he fell and was taken into custody by other officers [p. 24, line 17, to p. 25, line 6; p. 83, lines 10-17]. Appellant Mejia and his companion did manage to escape, however. The box which appellant Mejia's companion delivered to Young's residence was recovered and the contents were later analyzed by Thomas Wieland, a forensic chemist, and found to be marijuana [R. T. p. 220, lines 6-14].

It was not until March 20, 1957 that Deputy Burley again saw appellant Mejia. On that occasion Mejia, who apparently did not recognize Burley, *told* the latter (whom he believed to be a narcotics buyer) that he had almost been arrested by narcotics officers on or about February 20, 1957 after he had delivered 80 pounds of marijuana to Peter Young [R. T. p. 86, lines 6-21]. On April 12, 1957 Mejia was arrested. Appellant was subsequently convicted of unlawfully receiving, concealing, and transporting marijuana in violation of 21 U. S. C. §176(a).

Summary of Arguments.

I.

IT WAS NOT ERROR FOR THE COURT TO ORDER TWO DEFENDANTS, SEPARATELY INDICTED, TRIED TOGETHER WHERE THE OFFENSES CHARGED EMANATED FROM THE SAME ACTS OR TRANSACTIONS.

II.

THERE WAS NO ERROR IN THE COURT'S REFUSAL TO GRANT APPELLANT A NEW TRIAL BECAUSE ALL STEPS WERE TAKEN BY THE COURT TO PRECLUDE THE POSSIBILITY OF PREJUDICE RESULTING FROM THE CONSOLIDATION OF APPELLANT'S CASE WITH ANOTHER CLOSELY RELATED CASE.

III.

THE GOVERNMENT PRESENTED SUBSTANTIAL EVIDENCE FROM WHICH INFERENCES CONSISTENT WITH GUILT AND INCONSISTENT WITH INNOCENCE WERE PROPERLY DRAWN BY THE JURY.

ARGUMENT.

I.

It Was Not Error for the Court to Order Two Defendants, Separately Indicted, Tried Together Where the Offenses Charged Emanated From the Same Acts or Transactions.

Appellant's position regarding consolidation of the indictments involved herein flies in the face of authority, both statutory and decisional. It is submitted that it is not necessary to look further than the Federal Rules of Criminal Procedure to answer appellant's charge of error in regard to his joinder with Peter Young. Rule 13 prescribes that

“(t)he court may order two or more indictments or informations or both to be tried together if the offenses, and the defendants if there is more than one, could have been joined in a single indictment or information.” (Title 18, U. S. C. A.)

Therefore, it is necessary to determine if the offenses of Mejia and his codefendant, Young, could have initially been joined in a single indictment or information. The answer to this depends upon the provisions of Rule 8 and particularly upon Rule 8(b). [*Malatkofski v. United States*, 179 F. 2d 905 (1st Cir., 1950); *Cataneo v. United States*, 167 F. 2d 820 (4th Cir., 1948).] Rule 8(b) in material part says that

“ . . . (t)wo or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. *Such defendants may be charged in one or more counts together or*

separately and all of the defendants need not be charged in each count (18 U. S. C. A., Rule 8(b))." (Emphasis added).

The instant case fits exactly within the provisions of Rule 8(b). Both appellant Mejia and Peter Young participated in the events surrounding the transportation and delivery of marijuana to Young's residence. There is little doubt that these events constitute a "series of acts or transactions" within the meaning of Rule 8(b). In *Cataneo v. United States*, 167 F. 2d 820 (4th Cir., 1948), the court quoted Justice Sutherland's classic definition in *Moore v. New York Cotton Exchange*, 270 U. S. 593, when it stated that

" '(t)ransaction' is a word of flexible meaning. It may comprehend a series of many occurrences, depending not so much upon the immediateness of their connection as upon their logical relationship." (167 F. 2d 820, 823).

Can there be any doubt that Mejia's driving up behind Young's residence on February 20, 1957 where a large box of marijuana was unloaded has a logical relationship with Young's attempted sale of marijuana to Sergeant Landry and Agent Richards during the same hour on the same day? Moreover, the last sentence of Rule 8(b) precludes any serious claim of error in the instant case since it authorizes the consolidation of offenses where some of the counts are not common to all the defendants. In *Daley v. United States*, 231 F. 2d 123 (1st Cir., 1956), *cert. den.*, 351 U. S. 964, Judge Magruder succinctly states that

" . . . (r)ule 8(b) on its face contemplates the situation where some of the evidence might be admissible against one defendant and not against a

codefendant at a single trial, for in its concluding clause the rule provides that 'all of the defendants need not be charged in each count.'" (231 F. 2d 123, 125.)

In other words, the mere consolidation for trial of appellant Mejia and his codefendant, Young, did not prejudice appellant merely because some counts did not refer to him. Appellant's position seems to be the converse of this proposition when he states that

"(i)t is error to try two defendants together where one is charged with only a minor fraction of the offenses the other is charged with, and where neither defendant knows of the other." (Ap. Br., *p. 1.)

If we dispense with appellant's unwarranted conclusions that his offense was only a "minor fraction" of those with which Young was charged and that neither defendant knew of the other (a fact which the jury had an opportunity to consider) the feeling of prejudice which appellant's brief seeks to arouse is quickly vitiated. It is, in the first place, debatable that one-fourth of the offenses Peter Young was charged with was a "minor fraction." In fact, it could be argued that this was a rather substantial fraction. There were not involved so many offenses in this case that Appellant Mejia's indictment was buried under a morass of material wholly irrelevant to the offense with which he was charged. His offense was clearly delineated in the indictment which was read to the jury by the court before any evidence was presented [R. T. pp. 5-8]. It was made quite clear that Tony Mejia was charged with one offense, and Peter Young was charged with four offenses. This was something the

*Appellant's Brief hereinafter referred to as Ap. Br.

jury could certainly understand. The fact that some of the evidence used in the government's case against Young was not used against appellant is of little moment, especially in a case such as this where there were only a small number of offenses charged, and where only two defendants were tried together. In fact, in *Turner v. United States*, 222 F. 2d 926 (4th Cir., 1955), *cert. den.* 350 U. S. 831, where two defendants, separately indicted, were ordered tried together, the court of appeals said that

“ . . . (o)ne might almost say that it would have been an abuse of discretion to require separate trials as to the two defendants since it would have required unnecessary repetition of substantially the same evidence. See Fed. Rules of Crim. Procedure 8, 13, 18 U. S. C. A.”

It is also universally held that questions of consolidation are within the sound discretion of the trial court. (*Turner v. United States*, 222 F. 2d 926, 932 (4th Cir., 1955), *cert. den.*, 350 U. S. 831; *United States v. Antonelli Fireworks*, 155 F. 2d 631, 635 (2d Cir., 1946), *cert. den.*, 329 U. S. 742, *reh. den.* 329 U. S. 826).

A reading of the cases cited by appellant do not seem to sustain his position, either. In *Dunaway v. United States*, 205 F. 2d 23 (D. C. Cir., 1953), cited by appellant on page 2 of the appellant's brief, one defendant was charged in three separate indictments with house-breaking on three separate occasions at three different places. The indictments were consolidated for trial under Rules 13 and 8(a), and the appellant was acquitted of one offense

but convicted of the other two. In *Dunaway*, the convictions were affirmed with the passing comment that consolidation is usually a matter for the discretion of the trial court. *Schaffer v. United States*, 221 F. 2d 17 (5th Cir., 1955) from which appellant quotes on page three of the appellant's brief concerned a set of circumstances not present in the instant case. In the *Schaffer* case, Schaffer and one Devenny were tried together for the third time after two prior mistrials had been declared. Schaffer's confession was brought in with instructions not to use it against Devenny. The appellate court, in reversing the convictions, held that the cases should have been severed for trial because the two defendants were so inseparably connected in all the transactions involved that Shaffer's confession was undoubtedly used against Devenny in spite of any instruction the judge might have given. In the instant case there were no such circumstances.

It is therefore submitted that there cannot possibly be any error predicated upon the trial judge's order to consolidate the separate indictments involved in the instant case. The circumstances involved herein and the law applicable thereto almost completely preclude the possibility that there was any abuse of discretion on the part of the learned trial judge in this regard.

II.

There Was No Error in the Court's Refusal to Grant Appellant a New Trial Because All Steps Were Taken by the Court to Preclude the Possibility of Prejudice Resulting From the Consolidation of Appellant's Case With Another Closely Related Case.

This allegation of error is, of course, closely connected with appellant's allegation that the initial consolidation of Mejia's case with Young's was erroneous. It should be noted, once again, that the trial judge carefully pointed out to the jury that Appellant Mejia was charged with only *one* offense when he read the indictment to the jury before the introduction of any evidence. To further avoid the possibility of any confusion which might ensue as the trial progressed, the court further explained the indictment as follows:

“You will notice that the date and the quantity of marijuana and the offense charged in Count 4 of the indictment against Peter Young is virtually the same in words and is the same in substance as the offense charged against Tony Campos Mejia and it appears to be the same in substance as the offense charged against Tony Campos Mejia in the other indictment. Upon representation of the Government that the same evidence would be offered as against both defendants as to each alleged transaction, the cases are being heard and tried together.” [R. T. p. 8, lines 14-23].

And during the course of the trial it is difficult to imagine how or why the jury would decide to use evidence presented in the prosecution of Peter Young against Appellant Tony Mejia. The appellant was further protected by the judge's instructions to the jury after both

sides had rested. Lest they had forgotten his statements at the outset of the trial, he admonished them once again as follows:

“As you have noted, a separate crime or offense is charged in each count of the indictment in the Young case and a single count in the indictment in Mejia case. Each offense and the evidence applicable thereto should be considered separately. The fact that you may find the accused guilty or not guilty of one of the offenses charged should not control your verdict with respect to any other offense charged.” [R. T. p. 479, line 20, to p. 480, line 1].

We can, of course agree with appellant that when a defendant is prejudiced by consolidation with another defendant, a new trial should be granted, but it is difficult to see how appellant could have been prejudiced in view of the painstaking admonitions given by the trial judge to the jury. In *United States v. Haupt*, 136 F. 2d 661 (7th Cir., 1943) upon which appellant relies heavily, the number of defendants and the numerous overt acts alleged distinguish that case from the instant case in which there are only two codefendants. The *Haupt* case was further complicated by the fact that all the defendants were lumped into a single count indictment in which many overt acts were alleged, thus making it probable that the statements and acts of some defendants would be used against others, some of whom the government was not even certain were parties to the offense involved therein. Needless to say, the jury in the instant case was not confronted with such a complicated set of facts. In fact the same argument made under Section I, *supra*, that the small number of offenses charged almost precluded the possibility of confusion can be mentioned under this section as it is also relevant here. This fact, coupled with

the judge's admonitions and instructions, leave little ground upon which to predicate error from the court's refusal to grant appellant a new trial. Appellant was tried under standard procedures with all the safeguards guaranteed by our system of jurisprudence. He did not deserve a new trial.

III.

The Government Presented Substantial Evidence From Which Inferences Consistent With Guilt and Inconsistent With Innocence Were Properly Drawn by the Jury.

A reading of the record, or of the Statement of Facts included herein, will reveal that appellant's *conclusion* that there was no substantial evidence to support a conviction is without merit. Not only was Tony Mejia seen in his blue Plymouth picking up Peter Young's companion near Peter Young's residence on February 20 [R. T. p. 78, lines 11-16], but he was also positively identified in this same Plymouth automobile when it was parked behind Peter Young's house a few minutes later. It must be added, of course, that Mejia's unidentified passenger was observed carrying a large cardboard box into Young's house [R. T. p. 80, lines 7-10; p. 81, lines 18-21]. We must also note that the contents of this large cardboard box later proved to be marijuana [R. T. p. 220, lines 6-14]. This evidence alone is enough to support the jury's finding of guilt because

“(t)he proof in a criminal case need not exclude all *possible* doubt. It need go no further than reach that degree of probability where the general experience of men suggests that it has passed the mark of reasonable doubt.” (*Norwitt v. United States*, 195 F. 2d 127 (9th Cir., 1952), *cert. den.*, 344 U. S. 817).

There is, however, more evidence in the form of appellant's own admissions of guilt. On March 20, 1957, appellant told Deputy Burley, who was posing as a narcotics buyer, that he had narrowly escaped arrest after delivering marijuana to Peter Young about one month earlier [R. T. p. 86, lines 6-21]. In this connection, appellant's explanation that he was only bragging should not even be considered on appeal. This rather feeble excuse was brought out during the trial when appellant Mejia was on the stand [R. T. pp. 274-275, 281-282], and the jury chose not to believe him, but rather to believe the Government's witnesses. In this connection, and generally in considering appellant's arguments, it should be noted that authority is unanimous that the evidence should be considered in a light most favorable to the government when the case is before an appellate court. (*Arena v. United States*, 226 F. 2d 227 (9th Cir., 1955), *cert. den.*, 350 U. S. 954; *Woodard Laboratories v. United States*, 198 F. 2d 995, 998 (9th Cir., 1952); *O'Leary v. United States*, 160 F. 2d 333 (9th Cir., 1947)). As the court put it in *Woodard Laboratories v. United States*, *supra*:

"The verdict of the jury must be sustained if there is substantial evidence, taking the view most favorable to the government." (198 F. 2d 995, 998).

With this rule in mind, it is well to note that appellant has brought in his *own* evidence concerning the admissions made by Mejia to Deputy Burley (Ap. Br. p. 12, lines 12-13), has brought up material adduced on cross-examination (Ap. Br. p. 10, line 22, to p. 11, line 3), and has generally raised questions as to credibility and weight which the jury has already resolved in favor of the government. All this the appellant did after stating that

consideration would apparently be limited to the government's case (Ap. Br. p. 7, lines 22-26).

This rule, as paraphrased in the *Woodard* case, *supra*, presupposes that there was some substantial evidence upon which the verdict is based. In the instant case, it can scarcely be doubted that there was such substantial and competent evidence to connect Mejia with the events of February 20, 1957. As defined in *Woodard Laboratories v. United States*, *supra*, at 998

“Substantial evidence is . . . such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.”

The conclusion that Mejia was involved in the transportation and sale of marijuana on February 20, 1957 seems quite logical in view of the facts that he was seen driving near Young's house, picking up Young's companion, and delivering a cardboard box later proved to contain marijuana to Young's house. Even if the government were to concede, as it does not, that some of the evidence is as consistent with innocence as with guilt, that would not be determinative of the weight of the evidence. (*Woodard Laboratories v. United States* *supra*; *Schino v. United States*, 209 F. 2d 67 (9th Cir., 1953); *Stoppelli v. United States*, 183 F. 2d 391 (9th Cir., 1950) *cert. den.*, 340 U. S. 864, *reh. den.* 340 U. S. 898). In *Schino v. United States*, *supra*, the language was emphatic when the court said:

“ . . . The theory . . . that in a circumstantial evidence case a conviction cannot be supported if the evidence is as consistent with innocence

as with guilt, has been laid to rest by the Remmer case, at least where, as here, the question arises on a motion for judgment of acquittal.” (209 F. 2d 67, 72).

Appellant’s contentions regarding the credibility of testimony adduced at the trial are not well taken, either. If evidence is found to be substantial, the role of the appellate court is at an end, because questions of credibility are for the trial court. (*Bryson v. United States*, 238 F. 2d 657 (9th Cir., 1956); *C-O-Two Fire Equipment Company v. United States*, 197 F. 2d 489 (9th Cir., 1952); *Pasadena Research Laboratories v. United States*, 169 F. 2d 375 (9th Cir., 1948)). Thus, the questions appellant raises as to the length of time it took the officers to arrest Mejia (Ap. Br. p. 11, lines 12-16), and the alleged failure of Officers Burley and Farrington to recognize appellant on the day he was arrested, were questions of credibility which the jury resolved in favor of the prosecution. It must also be pointed out that the allegations that Mejia walked past Officers Burley and Farrington and that they did not recognize him were staunchly denied by these officers [R. Tr. p. 112, lines 19-22; p. 183, line 21, to p. 184, line 10]. Appellant failed to mention this fact in his brief.

Appellant’s contention that no inference of guilt can be drawn from Mejia’s ownership of the automobile used in the transportation of narcotics on February 20, 1957 is hardly worth the trouble of argument since not

only the automobile, but also Mejia, was identified positively at the scene of the crime.

Under the state of the law the evidence in this case amply supports the conviction of appellant Mejia.

Conclusion.

1. The consolidation of Appellant Mejia's indictment with that of Peter Young was authorized by Rules 13 and 8(b) of the Federal Rules of Criminal Procedure, since the offenses charged grew out of the same factual transaction.

2. The fact that Peter Young was charged with three more offenses than appellant Mejia cannot be used to predicate error as to the trial court's order to consolidate the indictments, since Rule 8(b) authorizes such procedure.

3. There was little chance that appellant Mejia was prejudiced since the number of offenses involved was small and there were only two defendants. Thus, the possibility of confusion was negligible.

4. Consolidation of indictments is generally considered to be within the sound discretion of the trial court.

5. Appellant Mejia was protected by the trial court's admonitions and instructions to the jury to consider his case separately from Young's and not to use evidence in the Young case against Mejia. Appellant was therefore not prejudiced.

6. On an appeal from a conviction, the evidence must be viewed in a light most favorable to the government.

7. The evidence against appellant was of sufficient substantiality and competency to sustain the conviction.

8. Questions of credibility were for the trial court and were resolved against appellant Mejia.

Wherefore, the government prays that the judgment be affirmed.

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No. 15717

IN THE

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

VIRGINIA K. BOWER,

Appellant,

vs.

MABLE CLAIRE BOWER, also known as and called
Mabel N. Bower,

Appellee.

BRIEF OF APPELLANT, VIRGINIA K. BOWER

Upon Appeal From the District Court of the United States,
for the District of Montana

H. C. HALL,
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Great Falls, Montana,
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Filed....., 1957.

.....Clerk.



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Appellee.

BRIEF OF APPELLANT, VIRGINIA K. BOWER

pon Appeal From the District Court of the United States,
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JURISDICTION

District Court

This action was commenced as an action in interpleader
y Western Life Insurance Company, a Montana corpo-
ation, against Virginia K. Bower, plaintiff in inter-

pleader and Appellant, and Mable Claire Bower also known as Mabel N. Bower, defendant in interpleader and Appellee, pursuant to the provisions of 49 Stat. 1096 (1936), as amended, 28 U.S.C.A. § 1335, in order that the defendants might be required to interplead and settle between themselves their right to money due under a certain single premium endowment policy issued to and on the life of Joseph Edward Bower, deceased. The action in interpleader was proper and the district court had jurisdiction under the provisions of the above-cited statute provided: the insurance company was under obligation to the amount of \$500 or more by virtue of the policy of insurance issued by it; the plaintiff had deposited the value of the policy into the registry of the court; and the two adverse claimants are of diverse citizenship as defined in 36 Stat. 1091 (1911), as amended, 28 U.S.C.A. § 1332 and claim to be entitled to one or more of the benefits arising by virtue of the policy of insurance. As disclosed by the complaint in interpleader of the Appellant herein (R. p. 11), the accrued value of the policy involved is \$10,093.17, and this amount was duly paid to and deposited in the registry of the district court in which the action was commenced (R. p. 11). The record further discloses that the Appellant is a resident of the State of Montana (R. pp. 9, 19) and that the Appellee is a resident of the State of Texas (R. pp. 9, 19). Both Appellant and Appellee claim to be entitled to the amount due under the policy in question. Therefore, the district court acquired jurisdiction over the controversy.

Court of Appeals

The lower court's judgment was made on August 19, 1957, entered by the Clerk on August 21, 1957 (R. pp. 36-47), and the decision of the district court (R. pp. 31-45) reprinted as 153 F. Supp. 25. Notice of appeal accompanied by proper undertaking was filed on August 26, 1957 (R. pp. 47-48, 50-51). The appeal and record were docketed on September 19, 1957 (R. p. 54). It is evident, therefore, that this court has jurisdiction on the Appeal.

I.

STATEMENT OF THE CASE

The plaintiff and defendant in interpleader agreed upon and submitted to the court below a statement of facts (R. pp. 3-9), which is the equivalent of findings of fact by the court upon which it may declare the applicable law.

United States Trust Co. v. New Mexico,
183 U. S. 535, 46 L. Ed. 315 (1902).

This agreed statement of facts establishes the following:

The Western Life Insurance Company, a corporation, on or about September 26, 1938, issued to Joseph Edward Bower a single premium endowment policy No. 89692, in the sum of \$10,000.00, in consideration of the payment to the insurance company of \$4,680.50. The policy designated the Appellee herein, Mable Claire Bower, then the wife of Joseph Edward Bower, as beneficiary. By its terms, the policy was payable to the insured, if living, on September 27, 1970, and in the event of his death before that date, to the named beneficiary, if living at the time claim should be made. The insured reserved to himself the right to change the beneficiary from time to time. A

copy of the policy No. 89692 was attached to the complaint in interpleader as Exhibit "A" and was made a part of the agreed statement of facts by reference (R. p. 4).

On or about August 15, 1946, Joseph Edward Bower and his then wife, the Appellee herein, under the name Mabel N. Bower, entered into a property settlement agreement (R. pp. 22-28), a copy of which was attached to Appellee's answer and cross-complaint in the court below as Exhibit "A," made a part of the agreed statement of facts by reference, and which reads in its pertinent parts as follows:

"THIS AGREEMENT made and entered into this 15th day of August, A. D. 1946, by and between MABEL N. BOWER, Party of the First Part and JOSEPH E. BOWER, Party of the Second Part, both of Great Falls, Cascade County, Montana.

"WITNESSETH:

"WHEREAS, the parties to this agreement are husband and wife and certain differences have arisen between them to such an extent that one or the other of the parties hereto is about to file divorce proceedings against the other party, and

"WHEREAS, the parties hereto desire to settle and adjust amicably certain matters arising out of any divorce proceedings that may be instituted by either party hereto against the other, with reference to the care, custody and control of their minor children, support money for the same, alimony, property settlement and costs and fees of any such proceedings for divorce instituted by either party hereto, against the other.

"NOW, THEREFORE, IT IS HEREBY MUTUALLY AGREED AND UNDERSTOOD, AS FOLLOWS, to-wit:

* * * * *

“II.

“That in the event First Party institutes said divorce proceedings against second party, it is to be understood that second party will pay such reasonable costs and attorneys’ fees for her up to and including THREE HUNDRED AND NO/100ths DOLLARS (\$300.00).

“III.

“That the first party, in lieu of any alimony for her support or any property settlement that the Court may decree and determine in her favor against the second party, herewith covenants and agrees to accept in full settlement of all and any claim she has or may have against the second party for such alimony or property settlement, the property settlement set forth in the following paragraphs, to-wit:

* * * * *

“VII.

“That it is understood and agreed that the Party of the Second Part has heretofore obtained a life or endowment insurance policy from the Western Life Insurance Company for \$10,000.00, in which the Party of the Second Part named the First Party beneficiary and that if and when any payments are made thereon by said insurance company, during both of the lives of the parties hereto, that the same shall be divided equally between the parties hereto; that in the event that the Second Party shall die first, all the benefits and payments under said policy shall inure to and belong to the Party of the First Part and be paid to her; in the event the Party of the First Part should die first, all such benefits and payments shall inure to and be payable to Party of the Second Part.

“VIII.

“That the transfers of all said property to the party entitled thereto, as herein provided, shall be consummated immediately after either one of the parties hereto

has obtained a Decree of Divorce from the other party hereto.

“IX.

“That in the event said property settlement is consummated, as aforesaid, each of the parties hereto herewith agree that they will not assert any claim against the other, whether in law or equity, by way of support money, alimony, property settlement or otherwise, and they each do, for themselves, hereby waive any claim of any kind that either of them may have against the other, including dower interests or against the property or estate of either, now owned or hereafter acquired by either one of them; they further agree that each of them will sign, execute and deliver any and all instruments to effectuate the intent of this agreement.”

At the same time and place that Joseph Edward Bower and the Appellee entered into the above-quoted property settlement agreement and as a part of the same transaction, the same parties entered into a so-called “Supplemental Agreement,” the terms of which were set out in full in the agreed statement of facts (R. pp. 5-7), and which reads as follows:

“THIS SUPPLEMENTAL AGREEMENT, made and entered into this 15th day of August, A. D. 1946, by and between MABEL N. BOWER, Party of the First Part and JOSEPH E. BOWER, Party of the Second Part, both of Great Falls, Cascade County, Montana.

“WITNESSETH:

“WHEREAS, the parties to this supplemental agreement, being husband and wife have heretofore, on the same date, entered into an Agreement with reference to property settlement, the care, custody and control of their minor children, support money for the same and costs and fees of any divorce proceedings instituted by

either party hereto against the other, and in consideration thereof,

“IT IS HEREBY SPECIFICALLY UNDERSTOOD AND AGREED that unless the First Party institutes a divorce proceedings against the Second Party on or before the 1st day of October, 1946, then, in that event, the Second Party shall have the right to institute such divorce proceedings against the First Party.

“IT IS FURTHER UNDERSTOOD AND AGREED that in the event that either party resists the divorce proceedings instituted against them by the other party, that, then in that event, said property agreement shall be cancelled and considered null and void and not be used by either party in any such divorce proceedings.

“IT IS FURTHER AGREED AND UNDERSTOOD that the Judge of any Court which may hear such divorce proceedings is hereby authorized, if the Court deems it warranted, to include in any decree of divorce any part or portion of said property settlement agreement.”

Pursuant to these agreements the Appellee herein, on or about September 26, 1946, instituted in the District Court of the Eighth Judicial District of the State of Montana an action for divorce against Joseph Edward Bower. The necessary jurisdiction over Bower was obtained, but he failed to appear and on October 24, 1946, his default was entered and the Appellee herein was given a decree of divorce (R. p. 7).

At the time the property settlement agreement was entered into, Joseph Edward Bower was in exclusive possession of the insurance policy in question, and he remained in possession thereof until the date of his death (R. pp. 8).

Subsequent to October 24, 1946, Joseph Edward Bower married Virginia K. Bower, the Appellant herein, and on or about December 7, 1949, in the exercise of his reserved right to change the beneficiary of the policy in question, he changed the named beneficiary from Mable Claire Bower to Virginia K. Bower. Virginia K. Bower, the Appellant herein, has at all times since, and is now, the named beneficiary of the policy in question (R. p. 8).

Joseph Edward Bower died on or about September 29, 1955, leaving surviving him his wife, Virginia K. Bower, Appellant herein, who made proof of his death to Western Life Insurance Company and made demand for payment to her of the proceeds of the policy in question (R. p. 8).

The Appellee herein bases her claim to the proceeds of this policy upon the agreements set forth above (R. pp. 8-9). The Appellant contends that, the agreements being void, Appellee ceased to be the beneficiary under the policy at the time Joseph Edward Bower exercised his reserved right under the policy to change the beneficiary and that since that time and at the present time, Appellee has no lawful claim to the proceeds thereof.

Following the institution of the action in interpleader in the court below by Western Life Insurance Company and after the execution and filing of the agreed statement of facts, Virginia K. Bower, as plaintiff in interpleader, and Mable Claire Bower, as defendant in interpleader, both filed motions for summary judgment (R. p. 29 and R. p. 30).

The order and judgment of the court below, by which

the Appellee herein was found to be entitled to the payment to her by the Clerk of the Court of the sum of \$10,093.17, less attorneys' fees of \$150 allowed to Western Life Insurance Company (R. pp. 31-45, 46-47), were apparently based upon the following points:

1. Where the right to change the beneficiary has been reserved by the insured, the beneficiary named in the policy of insurance has a mere expectancy and no vested right or interest therein during the life of the insured (R. p. 36). With this point Appellant agrees.

2. The reserved right to change the beneficiary named in the policy may not be exercised if the insured has divested himself of the right by agreement (R. pp. 36-37). With this point, as a statement of law, Appellant has no argument. However, it is the Appellant's contention that the point has no application to the present case since the insured, Joseph Edward Bower, did not divest himself of the reserved right by the agreement in question, that agreement being null and void.

3. Property settlements may create a vested equitable interest in the beneficiary named in the policy (R. p. 37-41). Assuming this point to be an accurate statement of the law, it is Appellant's contention that, for the reason that there was no valid property settlement agreement between Joseph Edward Bower and Appellee, the point has no application to the present case.

4. Any agreement between husband and wife intended to facilitate the procurement of a divorce is contrary to public policy and void (R. p. 41). Agreements conditioned upon divorce are likewise generally held to be against

public policy (R. p. 41). With this point Appellant agrees.

5. The agreements read together, as required by Montana law, facilitated divorce and are void (R. p. 42). With this point Appellant agrees.

6. The Montana Supreme Court has held severable property settlement agreements which facilitated divorce and were accordingly void (R. pp. 42-44). Appellant contends that the Montana cases referred to are distinguishable from and inapplicable to the present case.

7. Appellee herein presumably released certain property rights in consideration for the property settlement (R. p. 44). It is Appellant's position that this "presumption" is not justified by the facts of the case nor by the law of Montana. Appellant further contends that even if such consideration could be found in fact and law, the property settlement herein was also based on illegal consideration and is, therefore, void.

8. The Appellant can acquire no greater equity than the insured by virtue of her appointment as beneficiary. Under the Montana decisions the insured could not have relieved himself of the effect of this agreement; nor can his appointee (R. p. 45). It is the position of Appellant that, the agreement being void and inseparable, the insured was not bound by the property settlement agreement. Therefore, even assuming that it is a correct statement of the law to say that the Appellant can acquire no greater equity than the insured by virtue of her appointment as beneficiary, she is no more bound by the invalid and void property settlement agreement than is the insured himself.

II.

SPECIFICATION OF ERROR RELIED UPON

1. The court below erred in adjudging that the defendant in interpleader, Mable Claire Bower, also known as Mabel N. Bower, was the owner of and entitled to payment by the Clerk of the District Court of the sum of \$9,943.17 out of the Registry of the Court, which sum represented the proceeds of a life insurance policy No. 89692, less the sum of \$150 attorneys' fees, issued by Western Life Insurance Company to and upon the life of Joseph Edward Bower of which the plaintiff in interpleader, Virginia K. Bower, was named beneficiary, which judgment was based upon the following erroneous conclusions:

- (a) That a portion of the agreement between Mable Claire Bower and Joseph Edward Bower was legal.
- (b) That the portion of the agreement assumed to be legal was severable from the illegal portion and thus enforceable.
- (c) That there was a consideration for the portion of the agreement assumed to be legal, to-wit, a presumption that she released her property rights.
- (d) That the consideration for the legal portion of the agreement was separate and severable from the consideration for the illegal portion of the agreement.

III.

SUMMARY OF ARGUMENT

A. THE PROPERTY SETTLEMENT AGREEMENT WAS AND IS NULL AND VOID:

1. The property settlement agreement having been entered into by Joseph Edward Bower and the Appellee herein, as husband and wife, for the purpose and with the intention of facilitating the procurement of a divorce, is contrary to public policy and is void.
2. The property settlement agreement being conditioned and absolutely contingent upon the expressed agreement of the parties not to appear or defend in a divorce action instituted by the other spouse, is collusive and a fraud upon the courts and is, therefore, contrary to public policy and void.
3. The property settlement agreement being conditioned upon the granting of a divorce, is void as contrary to public policy.

B. THE PROPERTY SETTLEMENT AGREEMENT IS WHOLE, ENTIRE, AND INSEPARABLE:

1. The two agreements, being a part of one transaction, must be read together.
2. The decisions of the Supreme Court of the State of Montana referred to and relied upon by the court below in support of its ruling that the agreement in the present case is severable are not

applicable to the facts or law of the present controversy.

3. Under the decisions of the Supreme Court of the State of Montana, a contract is severable only if the separate promises are supported by separate and valid consideration.
4. The various portions of the property settlement agreement involved herein are not separately supported by such severable and valid consideration.
5. The court below erred in presuming that the Appellee herein released certain property rights of such value as to constitute consideration for the property settlement agreement.

C. A PROMISE SUPPORTED BY ILLEGAL CONSIDERATION IS VOID:

1. The agreement not to defend in the divorce action, and the condition contained within the property settlement agreement that it shall become effective only upon the granting of a divorce go to the heart of the property settlement agreement, taint each portion thereof, and are considerations for each such portion.
2. When the consideration for a promise is illegal in whole or in part, the promise is void.

D. THE APPELLANT HEREIN CANNOT BE BOUND BY THE PROPERTY SETTLEMENT AGREEMENT:

1. The property settlement agreement involved herein being wholly void, Joseph Edward Bower was not bound by it, nor is the Appellant.

2. Since the property settlement agreement is wholly void, the Appellee herein was unable to acquire any vested interest in the insurance policy under that agreement.
3. Since the Appellee herein bases her claim to the proceeds of the insurance policy upon the property settlement agreement, which is wholly void, she is unable to recover such proceeds.
4. The change in beneficiary of the policy in question being otherwise proper, and neither Appellant nor Joseph Edward Bower being bound by the property settlement agreement in any way, the change in the beneficiary through proper notice to the insurance company served to divest the Appellee of any interest she theretofore possessed as beneficiary of the policy and made the Appellant the lawful beneficiary of the policy and entitled to the proceeds thereof.

IV.

ARGUMENT

The claim of the Appellant herein to the proceeds of the insurance policy issued to and upon the life of Joseph Edward Bower is based upon the fact that she was, on or about December 7, 1949, designated by the insured, pursuant to his reserved right to change the beneficiary of the policy, as the beneficiary of the policy. Unless it can be shown that the insured in some manner validly and lawfully waived his right to change the beneficiary of the policy in question prior to December 7, 1949, the

exercise of that right on or about that date served to take from the Appellee herein any rights or interests she may have had theretofore under the policy. The Appellee contends that the property settlement agreement between her and the insured constituted a waiver by the insured of his reserved right and served to vest in the Appellee the right to the proceeds of the policy since the insured died during her lifetime. If the property settlement agreement under which Appellee asserts her claim (R. pp. 8-9) is wholly void and of no effect, the exercise by the insured of his reserved right to change the beneficiary had the effect ascribed to it by Appellant, and Appellant is entitled to the proceeds of the policy.

A. THE PROPERTY SETTLEMENT AGREEMENT WAS AND IS NULL AND VOID.

The court below correctly found that the property settlement agreement involved herein is contrary to public policy and so void and unenforceable, in that:

1. It was intended to facilitate the procurement of a divorce between the parties (R. pp. 41-42);
2. It was conditioned upon the divorce (R. p. 41); and
3. (By implication) it is collusive (R. pp. 41-42).

The almost universal rule is that agreements entered into by husband and wife to facilitate the dissolution of their marriage contract are void.

17 C. J. S. Contracts § 235.

6 Williston, Contracts (Rev. Ed. 1938) § 1743.

Restatement of the Law, Contracts (1932) § 586.

Keezer, Marriage and Divorce (3rd Ed., Morland, 1946) § 249.

Edleson v. Edleson,
179 Ky. 300, 200 S.W. 625 (1918).

Schley v. Andrews,
225 N.Y. 110, 121 N.E. 812 (1919).

Hodler v. Hodler,
95 Ore. 180, 185 P. 241 (1919),
Reh. Den., 95 Ore. 180, 187 P. 604 (1920).

Kegley v. Kegley,
16 Cal. App. (2d) 216, 60 P. (2d) 482 (1936),
Her. Den. by Cal. Sup. Ct. 60 P. (2d) 482 (1936).

Wagner v. Shelly,
241 Mo. App. 259, 235 S.W. (2d) 414 (1950).

Shelton v. Stewart,
193 Va. 162, 67 S.E. (2d) 841 (1951).

Staedler v. Staedler,
6 N.J. 380, 78 A. (2d) 896 (1951).

Equally universal is the rule that an agreement by one spouse not to defend a divorce action brought by the other is void.

Edleson v. Edleson,
179 Ky. 300, 200 S.W. 625 (1918).

Wright v. Martin,
214 Ala. 334, 107 So. 818 (1926).

Dennison v. Dennison,
98 N.J. Eq. 230, 130 A. 463 (1925),
Aff. 99 N.J. Eq. 883, 133 A. 919 (1926).

Allen v. Allen,
111 Fla. 733, 150 So. 237 (1933).

Goodwin v. Goodwin,
47 Ariz. 157, 54 P. (2d) 268 (1936).

Giddings v. Giddings,
167 Ore. 504, 114 P. (2d) 1009 (1941),
Sus. on Reh., 167 Ore. 504, 119 P. (2d) 280
(1941).

Green v. Green,
66 Cal. App. (2d) 50, 151 P. (2d) 679 (1944).

Perry v. Perry,
183 Tenn. 362, 192 S.W. (2d) 830 (1946).

Bloss v. Bloss,
251 S.W. (2d) 78 (Mo. App. 1952).

That a property settlement agreement conditioned on divorce is void since it tends to induce one or the other spouse to attempt to procure a divorce, is supported by substantial authority.

Hodler v. Hodler,
95 Ore. 180, 185 P. 241 (1919),
Reh. Den., 95 Ore. 180, 187 P. 604 (1920).

Schley v. Andrews,
225 N.Y. 110, 121 N.E. 812 (1919).

Willoughby v. Willoughby,
71 Colo. 356, 206 P. 792 (1922).

Dennison v. Dennison,
98 N.J. Eq. 230, 130 A. 463 (1925),
Aff., 99 N.J. Eq. 833, 133 A. 919 (1926).

Moss v. Moss,
20 Cal. (2d) 640, 128 P. (2d) 526 (1942),
(settlement conditioned upon an agreement to procure a divorce).

Shelton v. Stewart,
193 Va. 162, 67 S.E. (2d) 841 (1951).

As the court below properly recognized, the decision as to whether a contract is valid with respect to Montana public policy must be determined upon the basis of the statutes of Montana and the decisions of its courts.

Emporium Iron Co. v. Matlack Coal and Iron Co.,
30 F. (2d) 364 (3rd Cir. 1929).

Harding Glass Co. v. Pipe Line Co.,
39 F. (2d) 408 (8th Cir. 1930).

Lewis v. Jackson and Squire, Inc.,
86 F. Supp. 354 (D.C. Ark. 1949),
App. Dis. 181 F. (2d) 1011 (8th Cir. 1950).

The Supreme Court of Montana, as was said by the court below, has followed the rules set out above.

An agreement made to facilitate a divorce is void:

Stebbins v. Morris,
19 Mont. 115, 47 P. 642 (1897).

Sherman v. Sherman,
65 Mont. 227, 211 P. 231 (1922).

A property settlement conditioned upon a promise not to defend a divorce action is void:

Clary v. Fleming,
60 Mont. 246, 198 P. 546 (1921).

Grush v. Grush,
90 Mont. 381, 3 P. (2d) 402 (1931).

No Montana cases have been found applying the third of the rules stated above, but see:

Stebbins v. Morris,
19 Mont. 115, 47 P. 642 (1897).

The property settlement agreement involved in this case clearly partakes of illegality under each and every one of these rules.

The agreement is obviously intended to facilitate the procurement of a divorce. The supplemental agreement, for example, not only provides that, should the wife not institute the divorce proceedings before October 1, 1946, the husband may bring the action, but states that, regardless of which spouse initiates the divorce action, the property settlement is null and void should the other spouse defend.

Moreover, the validity of the agreement as a whole is conditioned upon the failure of the party sued to defend the divorce brought by the other. The effect of this provision is to make the mutual promise of each party not to defend part of the consideration for the entire agreement. The agreement is, therefore, collusive under the Montana decisions, the more so since it provides that either party may bring the divorce action, implying either that (1) both parties have a cause of action for divorce or (2) whether or not there are true causes for divorce, the complaining party may allege any cause he or she wishes, and the other will not resist. In either case the court hearing the divorce proceedings would not be possessed of all the facts, or might, indeed, not be possessed of the true facts. Either situation would constitute a fraud upon the court by the mutual agreement of the parties.

Grush v. Grush,

90 Mont. 381, 3 P. (2d) 402 (1931).

In addition, that portion of the agreement whereunder Bower agreed to pay up to \$300 toward Appellee's costs and attorney fees should she institute a divorce is also void as contrary to public policy.

17 C. J. S., Contracts § 235.

In *McCahan v. McCahan*, 47 Cal. App. 173, 190 P. 458 (1920) an agreement by the husband to pay attorney fees was struck down as contrary to public policy. The court pointed out that under California statutes the courts were entitled to make such orders as to costs and attorney fees as seemed equitable, and that the agreement in question deprived the court of this discretion. The court cited *Lec*

v. Lee, 55 Mont. 426, 178 P. 173 (1919) as a contrary decision on this last point. The *Lee* case involved a property settlement agreement made, the Supreme Court of Montana found, for the purpose of a separation. The agreement stated that, in consideration for a lump sum payment, neither party would assert against the other, should a divorce be instituted, any claim to, *inter alia*, attorney fees. Finding the agreement fair on its face, the Montana Supreme Court stated that the agreement was binding on the parties so that attorney fees could not be awarded. However, in *Coleman v. Sisson*, 71 Mont. 435, 230 P. 582 (1924), the Montana Supreme Court, without referring to the *Lee* case follows the argument of the *McCahan* decision regarding the powers of the court, casting grave doubt upon the validity of the *Lee* decision.

Since the effect of a promise to a wife by her husband to pay her attorney fees if she endeavors to procure a divorce tends toward the alienation of the wife and toward the facilitation of a divorce, such an agreement is void.

Edleson v. Edleson,
179 Ky. 300, 200 S.W. 625 (1918).

Finally the Bower agreement is not, by its terms, to become effective unless and until a divorce has been obtained by one party (R. p. 27). Whatever may be the effect of the preambular statements of the agreement, they are vitiated by this particular provision insofar as they suggest an urgency or reasonable necessity for the agreement. The agreement, even if considered only as a property settlement, suffers from the same defect which caused the court to strike down a complaint referring to

a property settlement agreement in *Stebbins v. Morris*, 19 Mont. 115, 47 P. 642 (1897), in which the court stated:

" . . . Had the complaint properly set forth any urgency or reasonable necessity for the agreement, then, no doubt, a cause of action would have been stated. . . . The complaint, too, while not perhaps directly susceptible of the inference, from the ambiguous manner in which it refers to a subsequent divorce obtained by the plaintiff, might very readily have engendered a suspicion in the mind of the district judge that the agreement had been entered into in contemplation of the divorce."

(19 Mont. at 121, 47 P. at 645).

In the present case there need be no "suspicion" that the agreement was in contemplation of divorce—a reading shows clearly that the parties made the agreement in contemplation of divorce.

B. THE PROPERTY SETTLEMENT AGREEMENT IS WHOLE, ENTIRE, AND INSEPARABLE.

It appearing, then, as the lower court found, that the property settlement agreement herein involved is void as contrary to public policy and as collusive, the question arises whether, as the lower court believed, the Appellee herein may rely upon any part of that agreement in support of her claim to the proceeds of the insurance policy.

The lower court correctly determined that the two agreements, being parts of one transaction, must be read together. This was the intention of the parties as expressed in their "Supplemental Agreement."

But even without the statement contained therein that the supplemental agreement was in consideration of the

property settlement agreement, the two agreements would have to be read together.

“Several contracts relating to the same matters, between the same parties, and made as parts of substantially one transaction, are to be taken together.”

Section 13-708, Revised Codes of Montana, 1947.

Ryan v. Bloom,

120 Mont. 443, 186 P. (2d) 879 (1947),

Cert. Den. 333 U. S. 874, 92 L. Ed. 1150 (1948).

The court below recognized, of course, that there is respectable authority supporting the position that the Appellee herein is not entitled to rely on any portion of a void contract and cannot, accordingly, recover in this action. The court was, however, of opinion that the law of Montana was such that the contract could be separated and the legal portions enforced. The court discussed, in support of this position, two decisions of the Montana Supreme Court: *Herrin v. Herrin*, 103 Mont. 469, 63 P. (2d) 137 (1936); and *Ryan v. Ryan*, 111 Mont. 104, 106 P. (2d) 337 (1940). Also, the case of *Grush v. Grush*, 90 Mont. 381, 3 P. (2d) 402 (1931) was referred to.

It is believed that the court below entertained some misapprehension as to the applicability of these cases to the present controversy. Appellant's counsel have examined the opinions and transcripts in these cases and it appears that, with the exception of certain portions of the *Grush* case, the decisions can be distinguished from, and do not apply to, the facts of the present case.

1. *Grush v. Grush*, 90 Mont. 381, 3 P. (2d) 402 (1931):

Delbert Grush brought action for divorce against his

wife, Ruth, alleging wilful desertion. Ruth's demurrer, presented to the court without argument, was overruled and she refused to plead further. The court entered her default and granted Delbert a divorce upon the grounds alleged in his complaint. The decree ordered plaintiff to pay a specified alimony.

Several months after the decree, Delbert, having theretofore paid the required alimony, moved to annul that portion of the decree granting alimony, upon the ground that the court was without jurisdiction to award alimony when the wife was the party in fault. Ruth answered this motion and filed her own motion that a certain agreement between the parties be made a part of the original decree, asserting that the alimony had been granted pursuant to this agreement. The agreement, entered into after the commencement of the divorce action, is set forth at Number 1 of Appendix II to Appellant's brief.

Defendant's answer stated facts which, if true, would have been a defense to the original action and which would have established her as the injured party. She alleged that, but for her reliance upon the agreement, she would have appeared to defend against the divorce. The evidence indicated that the agreement, with the exception of the alimony payments, was fully executed prior to the decree of divorce.

The court denied Delbert's motion in an order which quoted the earlier decree and the agreement, but which did not amend the original decree. Plaintiff appealed, alleging that the agreement was not involved in the action and that, in any event, it could not give the court jurisdiction in the premises. Ruth's brief before the Supreme

Court pointed out that neither party questioned the validity of the agreement.

The Supreme Court was of opinion that the lower court was without authority to award alimony when the husband is the injured party, and that the consent of the parties to the divorce action could not cure this jurisdictional defect. The court stated:

"... Had the divorce decree in this action been based upon defendant's wilful desertion in fact, the order of the district court denying plaintiff's motion would be erroneous." (90 Mont. at 386, 3 P. (2d) at 403).

The Supreme Court referred to an "agreement" between the parties, not to the written agreement as such, but to an agreement of which the written covenants were only a part.

"... The evidence of the defendant shows an agreement between the two [parties] that plaintiff should prosecute his action and that she would not defend in consideration that plaintiff's promise to pay alimony should be incorporated in the decree, and tends to conceal what might have been found to be the true cause of the divorce. Such an agreement savors of collusion and is opposed to public policy and a fraud upon the court, and the court if satisfied that the decree was based upon such an agreement, might *sua sponte* have set it aside." (90 Mont. at 387, 3 P. (2d) at 404).

The void agreement was not the written agreement as such, but an agreement containing defendant's promise not to defend. Due to this collusive agreement the essential fact as to who was the offender was not litigated, and the Supreme Court said that, should plaintiff be given the relief he sought, the court might be aiding in the fraud. Finding "no good reason, so far as public policy is con-

cerned, why the decree annulling the marriage should not stand," since even if the defendant had resisted the plaintiff's action there would probably have been a divorce, the Supreme Court concluded:

"The plaintiff having accepted the benefit of the decree, entered on his motion and with his consent, in so far as it awards the divorce, he should not be permitted to be relieved from its burdens, agreed to by him . . . in consideration that the decree run to him on the ground of defendant's wilful desertion—an issue which might have been decided otherwise were it not for the agreement in reliance upon which she failed to oppose the divorce action. The court properly left the parties where they had voluntarily placed themselves by their agreement." (90 Mont. at 388, 3 P. (2d) at 404).

The benefits and burdens to plaintiff, said the Supreme Court, were those of the decree. The illegal agreement was that by which defendant covenanted not to defend. The written agreement, as such, was not considered.

Defendant's reliance and, therefore, plaintiff's fraud, are central to the *Grush* decision. In a later case, *Ryan v. Ryan*, 111 Mont. 104, 106 P. (2d) 337 (1940), the court said that "in the *Grush Case* the question of fraud was raised defensively to prevent the moving party from benefiting by the fraud, whereas in this case [the *Ryan* case] it is raised affirmatively by the moving party for his own benefit."

111 Mont. at 109, 106 P. (2d) at 338.

The *Grush* case is applicable to the present one to the extent that it supports the rule in Montana that an agreement not to defend a divorce action is collusive and void. That portion of the decision under which the Supreme

Court protected the wife from the illegality of the agreement does not apply to the facts of the present case. In the *Grush* case the court was concerned with the equities in favor of the defendant wife. Particularly telling to that court was the fact that, if plaintiff obtained the relief he sought, Ruth would have been kept from court by what would have amounted to intrinsic fraud. Here the situation is exactly the reverse. Appellee herein not only was not kept from court, but was plaintiff in the divorce action. It was Appellee who, through a collusive agreement, kept the deceased from court. She has had her day in court. It is difficult to find any equities in favor of Appellee who has received the benefit of the divorce decree and who now seeks to assert her own illegal agreement against Appellant who was not a party to that collusive agreement.

2. *Herrin v. Herrin*, 103 Mont. 469, 63 P. (2d) 137 (1936):

On July 16, 1934, plaintiff instituted a divorce action alleging his wife's wilful desertion. The wife denied the desertion and her cross-complaint, which stated she did not want a divorce, but only separate maintenance, alleged that plaintiff had, in fact, deserted her, that he had subjected her to extreme mental cruelty, and that he had failed in his duty to support her. She asked for alimony. Plaintiff's reply alleged the execution of an agreement between the parties on May 21, 1934. The agreement is set forth as Number 2 to Appendix II to Appellant's brief.

Plaintiff asserted that he had fully performed the agreement and that he was thereby released from all liability

to the defendant. The sur-reply denied that plaintiff had fully performed the agreement and asserted that the agreement was void on its face as contrary to public policy.

The court's decree granted the defendant the right to live apart from the plaintiff and awarded her support payments of \$35.00 a month. The plaintiff appealed to the Supreme Court of Montana, which reversed the decision and remanded the case for a new trial.

The Supreme Court's decision, which is hardly a model of clarity, pointed out that the record of the case was so obscure that the Supreme Court found itself unable "to determine the controversy with full confidence in the fairness and justice of such determination." (103 Mont. at 471, 63 P. (2d) at 138). One can only wonder, after such a statement, as did the dissenting justice, at how authoritative the Court's decision can be assumed to be.

Nonetheless, having made the statement, the Court then proceeded to a determination of the case. It found that the testimony of the man who had drawn the agreement for the parties supported the contention of the defendant that the agreement was entered into with the intention of facilitating a divorce and that it was therefore void insofar as it related to a divorce. Finding it inequitable to permit one to profit by the provisions of such an agreement, then avoid the objectionable parts by invoking the rule making the agreement a nullity, the Court held the contract to be separable and, as to the property settlement, valid and binding upon the parties.

The Court said it had grave doubts that there was desertion by either party and that the evidence suggested a

separation by mutual consent. In discussing the question of the property possessed by plaintiff at the time the action was commenced, the Court pointed out that there was no actual showing of his financial condition at that time and that it would be to no purpose to impose an obligation upon him unless it could be shown he had the ability to discharge the obligation.

In summary, the decision said there was insufficient evidence to allow the district court to find plaintiff entitled to divorce; the separate maintenance decree was set aside; the agreement as it related to a divorce was held void; and the property agreement, separated from the void portions of the agreement, was held valid. The agreement was held severable because it would be inequitable to permit a person to profit by the agreement and then avoid its obligations by invoking the rule making the agreement void. This reasoning is much the same as that in the *Grush* case—which was not cited although it was referred to in the briefs on appeal.

Defendant, Mrs. Herrin, asserted the nullity of the agreement. It would appear, therefore, that the Court's statement of inequities was directed at her actions. She received most, if not all, of the property provided for in the agreement and then sought alimony which was waived by the agreement. The question becomes, what portion of the agreement was void, and what valid. The Court looked to extrinsic evidence to find the illegality, as it had in the *Grush* case. That evidence was said to be that of Judge Galen. The transcript reveals the testimony set forth as Number 3 of Appendix II to Appellant's brief.

In this same connection, plaintiff, defendant, and Mrs. Galen gave the testimony set forth as Number 4 of Appendix II to Appellant's brief.

These excerpts from the transcript show that there is nothing therein which indicates just which portion of the property settlement agreement was void and suggest some confusion as to just why the agreement was invalid even in part. It was the plaintiff husband who sought the divorce. He asserted the validity of the agreement and was not attempting to avoid any of its burdens. Defendant, who asserted the agreement was void as contrary to public policy, further asserted that she at no time wished a divorce. If the evidence in support of this contention is true, it indicates that she did not sign with the intention of facilitating a divorce. Her two contentions would appear to be irreconcilably inconsistent. Regardless of her attitude at the time of signature, she did not, when the chips were down, facilitate a divorce, but defended so successfully, at least the first time around, that no divorce was granted. Thus, if the agreement were designed to facilitate a divorce, it may be said that defendant either repudiated or breached the agreement by her successful legal proceedings.

Judge Galen said that the agreement was made after a divorce had been determined upon by the parties, thus, impliedly, bringing the agreement within *Stebbins v. Morris*, 19 Mont. 115, 122, 47 P. 642, 645 (1897):

"... If, however, it can be established that it was entered into without any collusive intent, and as merely incidental to a decree of divorce obtained without collu-

sion, the plaintiff's right to recover would assume a different aspect."

Moreover, the drafting attorney, Judge Galen, was on the Montana Supreme Court at the time the *Grush* case was decided and he concurred in that decision.

These comments do not, of course, affect the holding in the *Herrin* case, but they do indicate that there is some real question that the agreement was in fact void in any part. Neither the testimony nor the Supreme Court explicitly state which portions of the agreement were void and which separable.

The *Herrin* agreement was in fact divided into two parts. In the first, a property settlement was made for the express consideration of \$1.00 and other good and valuable considerations. In the second, the wife agreed, in consideration for the transfer of the property, to release her husband from all costs of the divorce, including alimony. She further agreed that full satisfaction of all her property rights was acknowledged; that the decree of divorce, if any, should so recite; and that she would thereafter make no further demands against her husband or his estate.

All of the provisions relating to the property settlement are contained in a clause making no reference to the divorce and setting forth a consideration. Presumably the void provisions are in that clause which imposes obligations upon the defendant. Plaintiff could receive no benefits under the agreement unless the defendant were bound thereby to waive certain rights. He would be required to pay alimony unless the defendant were bound

by her promise to waive alimony. And yet, it appears that the Supreme Court did separate the agreement following the clause relating only to the property settlement. This is established by the fact that the Court, having discussed the question of separability, discussed alimony, stating not that it was barred under the valid provisions of the agreement but that it should not be awarded absent a showing that plaintiff was financially able to pay. The clear implication is that, on showing of financial worth, plaintiff could be ordered to pay alimony, and it must follow that the Court viewed defendant's agreement to waive alimony as being void.

The Supreme Court of Montana has not, apparently, been too clear as to the effect of the *Herrin* case. In *Smith v. Jack Pot Mining Co.*, 109 Mont. 445, 97 P. (2d) 368 (1939), plaintiff sued upon a contract which the Supreme Court said was either one by which plaintiff was to procure purchasers for the capital stock and property of the defendant, or else whereunder plaintiff was to buy the capital stock and property. The contract itself recited the purchase price of the stock and property but made no recital of consideration for the contract *per se*. The lower court sustained general and special demurrers to an action for breach of contract. The Supreme Court found the contract sufficiently clear that an action could be based upon it and said that, in the absence of a statute, consideration for a contract need not appear on its face, so that plaintiff's allegations of performance, if proved, would constitute sufficient consideration.

The defendant argued that the contract was void since

it provided for the sale of the company's capital stock. The Court found two objects to the contract: first, the sale of the stock, and second, the sale of the property. A sale of the property, if the statutes were complied with, as alleged, would be lawful, and the Court did not pass upon the question of the lawfulness of the sale of stock. Citing the *Herrin* case without discussion, the Court found the contract separable and, as to the property, at least, binding. It will be noted that, under the Court's view of consideration, should plaintiff find a buyer for the property, or should it stand ready to buy the property, that would be consideration for the separate section of the contract in question.

The only other discussion of the *Herrin* case in the Montana Supreme Court appears to be that in *Ryan v. Ryan*, 111 Mont. 104, 106 P. (2d) 337 (1940), the facts of which will be set out below. Referring to the *Herrin* case, the Court said:

"Furthermore, in *Herrin v. Herrin*, 103 Mont. 469, 63 P. (2d) 137, this court held under analogous circumstances that the contract should be held separable and that even though the divorce decree were to be set aside as void and against public policy, the separation agreement should stand. That holding is especially applicable where, as here, there is express consideration for the support provision, in this case the wife's relinquishment of her property rights. Here the suit is upon the separation agreement, and not upon an alimony provision in the decree itself." (111 Mont. at 109-110, 160 P. (2d) at 338).

All of which makes the *Herrin* decision even less clear. Unless the Court in the *Ryan* case, in speaking of a "divorce decree" means the decree of separate maintenance,

there was no "divorce decree" to set aside in the *Herrin* case, and the decree of separate maintenance was not set aside as against public policy (that aspect of the decision going to the agreement), but because of errors in the findings and conclusions of the trial court. There was nothing in the *Herrin* case to show that a decree of separate maintenance could not be granted upon a proper showing, and there was clear indication that alimony could be awarded, notwithstanding the agreement, if plaintiff were financially able to pay. Further, the *Ryan* decision indicated the Court's view that what was separated was the *Herrin* "separation agreement" from the "divorce decree." This was not the case. The *Herrin* agreement itself was the thing separated, someplace or other, by the *Herrin* decision.

We find little, if any, help in understanding the *Herrin* case from the discussion of that case after it was decided. However, the *Herrin* decision cited prior Montana cases as authority for its holding. The Court thus stating that it was following the existing law of Montana, it becomes necessary to ascertain the law of Montana as related to the separability of contracts. This question will be discussed below.

3. *Ryan v. Ryan*, 111 Mont. 104, 106 P. (2d) 337 (1940):

On June 1, 1938, Anna and Phillip Ryan, then husband and wife, entered into an agreement set forth as Number 5 to Appendix II to Appellant's brief.

This agreement was executed after Anna commenced action for separate maintenance and Phillip filed a cross-

action for divorce. Divorce was granted on June 16, 1938. Anna sued upon the agreement, alleging Phillip had failed to pay the agreed alimony. Defendant's answer alleged that the agreement was null and void as contrary to public policy, as collusive, and since plaintiff had agreed not to defend further in her suit for separate maintenance and had fulfilled this agreement. The district court gave judgment for plaintiff. Plaintiff's brief on appeal pointed out that appellant had alleged no facts which would be evidence of collusion except a failure to plead further in the case. The brief also alleged reliance by plaintiff on defendant's promises and actions.

Although the court below in the present case stated that the Ryan agreement was "entered into collusively and therefore illegal" (R. p. 44), the Supreme Court in the *Ryan* case said that the separation agreement indicated that it was entered into in contemplation of a divorce, but "not that it was to be fraudulently or collusively obtained." (111 Mont. at 108, 106 P. (2d) at 338).

The Supreme Court said that the sole question before it was whether the answer stated a defense to the complaint. The lower court's decision was affirmed.

The Court, then, did not pass on the question of collusion. The effect of the Court's decision, which suggests the Court's doubt that the agreement was illegal, is that even if there were collusion, plaintiff should have her judgment. The opinion is primarily based upon that portion of the *Grush* case which related to fraud, apparently taken from Mrs. Ryan's allegation of reliance: "the equities in favor of the wife [Mrs. Ryan] are no less

compelling than in the *Grush Case*." (111 Mont. at 109, 106 P. (2d) at 338).

While apparently citing the *Herrin* decision with approval, the Court not only indicated some justifiable confusion as to the holding in the *Herrin* case, but even cast grave doubt upon its validity, especially in stating that the earlier case held that the "separation agreement" should stand. The Court appeared to be of the opinion that the *Herrin* case held that the agreement, as a separation agreement between persons who remained husband and wife, was valid.

If this is indeed the holding in the *Herrin* case, it becomes even more inapplicable to the present case. The Bower agreement was not to become operative as to any of its property agreements until a divorce was granted. As a separation agreement it is, by the express intention of the parties, non-existent. It cannot be separated, as far as operative effect is concerned, from the divorce decree. In this connection, it should be noted that the execution of the Ryan agreement did not in any way depend upon the divorce being granted. Under that agreement, for example, payment of alimony was to begin not only prior to the divorce, but from a date prior to the agreement itself. All the personal property had already been divided between the parties, and, as the Court said, the Ryan agreement, separated from the divorce decree, would be a binding separation agreement even should the divorce decree be set aside. That is clearly not the situation in the Bower agreement.

In the *Grush* and *Herrin* cases the Court had to look

beyond the written agreement to find the collusive and illegal matter. In the *Ryan* case the Court did not look beyond the agreement and found in the agreement no collusion. In this important regard we have another distinction between these three cases and the present case. The Bower agreement is quite explicit, almost honest, as to its collusive nature. A clearer case of an agreement intended to facilitate a divorce would be hard to imagine, and this without benefit of any outside testimony.

In separating the property settlement agreement in the *Herrin* case, the Court said it was following the existing law of Montana. The *Ryan* opinion, to the extent that its comments about the *Herrin* case are other than dicta, merely followed the pattern laid down in the earlier case, making it necessary to determine the law of Montana as related to the separability of contracts.

The following general principles relating to the separability of contracts under Montana law may be stated:

1. Whether a contract is entire or severable depends largely on the intention of the parties thereto, which may be gathered from the terms of the agreement.

Purdin v. Westwood Ranch and Livestock Co.,
67 Mont. 553, 216 P. 326 (1932).

Smith v. Fergus County,
98 Mont. 377, 39 P. (2d) 193 (1934).

This rule is apparently universally applied:

17 C. J. S., Contracts § 332.

Applying this rule to the Bower agreement, the clear intention of the parties was that the contract should be entire and indivisible. Not only do the preambular state-

ments of the property settlement agreement state that the parties desire to settle and adjust certain matters "arising out of any divorce proceedings" (R. pp. 22-23), but the property transfers are not to take place until after the divorce (R. p. 27) and the waiver of the marital rights of the parties, including waiver of alimony, is conditioned upon the consummation of the property settlement and the divorce. Further, the entire agreement is to be void should either party defend against a divorce requested by the other (R. p. 6). There are only two other provisions in the property settlement agreement itself. One deals with the custody of the children, a question arising only should the parties be divorced, and the other concerns payment of Appellee's attorney fees should she institute divorce action.

The parties intended that each and every provision of the agreement be dependent upon the divorce. Not one clause will have any validity in the absence of a divorce. Indeed the entire agreement falls if there is no divorce. Measuring the agreement by the intention of the parties, the agreement was meant to be indivisible and entire, no portion to be valid unless the others were, and all conditioned upon a divorce decree.

2. If the consideration for the promises is single and entire, the contract is entire.

Hughes v. Mullins,
36 Mont. 267, 92 P. 758 (1907).
17 C. J. S., Contracts § 334.

In *Edgerton v. Power*, 18 Mont. 350, 45 P. 204 (1896) plaintiff sued upon a promissory note. The answer alleged

a certain contract and said that the note was made in connection with that contract. It was said in the preamble to the contract that plaintiff owned certain shares of railroad stock; that defendant would buy half this stock for \$8,000; and that the parties desired to act in harmony in the management of the railroad. The first article of the contract provided for the purchase and sale of the stock for \$8,000, for which sum the buyers gave their note payable to the seller six months from the date of the contract. The contract contained other sections relating to stock pooling and other matters. The defendants claimed that all the sections of the contract were consideration for the note and that the consideration had failed. The Supreme Court said that the consideration for the note might include the "premises" (*i.e.*, the preamble, stating some facts and some desires), but found that the first paragraph was complete in itself and that the consideration for the note was the delivery of the stock.

The *Herrin* decision recognizes this rule, the Court citing *United States Building and Loan Association v. Burns*, 90 Mont. 402, 4 P. (2d) 703 (1931), a case involving an agreement between the plaintiff, as mortgagee, and one Mains, successor to the mortgagor. Mains was in default under the mortgage and made an agreement with the plaintiff, without the consent of the defendant Burns, a prior holder of the mortgaged property, which provided that Mains would give plaintiff a chattel mortgage upon the furniture and fittings of the property and would execute a note for the amount of taxes he had failed to pay. It was also agreed that should Mains fail

to pay at least \$200 per month on the original loan and mortgage, he was to deliver a good and sufficient deed of the property to plaintiff. Plaintiff brought a foreclosure action, joining as defendants all who had become connected with the title. The lower court ruled that Burns was personally liable for any deficiency after foreclosure sale. Burns appealed, alleging that the agreement between Mains and plaintiff, made without his consent, prejudiced him as surety and that he was thereby exonerated from any liability on the mortgage. The Supreme Court found that Burns had been prejudiced and that he was exonerated. Plaintiff attempted to assert that his agreement with Mains was void as a contract for forfeiture of property subject to a lien in satisfaction of the obligations secured thereby. The Court conceded this point and examined the further question whether the void stipulation vitiated the entire agreement. Saying that the void stipulation would vitiate the entire agreement unless it were severable, the Court stated:

"... The first part of the contract has no necessary relation to the second, nor has the second to the first. While it is argued by counsel for plaintiff that there is not any consideration for the agreement (although there is not any plea on that score), there is ample consideration for that part which relates to the taxes . . . and this without reference to the second part." (90 Mont. at 421, 4 P. (2d) at 708).

Examined in the light of this decision, it becomes evident that the *Herrin* case, to the extent it separated the property agreement, stands for the proposition that the property settlement portions of the agreement can be separated from the void portions *if there is a separate and*

wholly valid consideration for the property settlement.

The court below recognized the requirement of consideration for the separate portions of the agreement. Appellant contends, however, that the court erred in two ways in this regard: (1) in finding any valid consideration for the property settlement agreement and (2) in failing to recognize the rule that if any portion of consideration for a promise is void, the promise is void.

The lower court apparently recognized that the consideration given by Appellee herein for the property settlement is, at best, nebulous. The court did not find any particular consideration nor say what that consideration might be, but "presumed" the release of certain property rights (R. p. 44). This presumption is not well taken. Appellee received more by virtue of the property settlement than she would have received by operation of the law of Montana had she remained his wife.

Section 22-101, Revised Codes of Montana, 1947, provides in part:

"A widow shall be endowed of the third part of all lands whereof her husband was seized of an estate of inheritance at any time during the marriage, unless the same shall have been relinquished in legal form."

While it is true that Appellee would also have received one-third of the estate remaining after dower rights were determined had Bower died still married to her (Section 91-403, Revised Codes of Montana, 1947), her rights to real estate under this section, and to all personal property, are mere expectancies. Should Bower have disposed of any such property during the marriage, Appellee would

have had no right to any share thereof, save dower in the real property. And should a divorce have been granted and the agreement between the parties not have been made, Appellee would, since she could no longer become Bower's "widow," have no dower rights whatever, nor any standing to take by inheritance as Bower's "wife."

O'Malley v. O'Malley,
46 Mont. 549, 129 P. 501 (1913).

The careful division of the real and personal property in the Bower agreement on a fifty-fifty basis gave Appellee a greater share of the property than she renounced by the agreement. The benefit was clearly in her favor. It cannot be said that the deceased husband received such benefits as would make it inequitable for him to assert the invalidity of the agreement, and certainly it cannot be said that Appellant, being no party to the agreement, received any benefit therefrom.

Appellee had no interest in the insurance policy in question, prior to the date of the illegal contract, other than as beneficiary. By the contract Appellee was to receive, if she were alive at the time the insurance became payable, no less than half the proceeds. Even should the contract be otherwise separable, no consideration is shown for deceased's promise in this particular article such as to make it a binding contract.

C. A PROMISE SUPPORTED BY ILLEGAL CONSIDERATION IS VOID.

In addition to the fact that the Bower agreement is not supported by any valid consideration, it contains illegal elements as invalid consideration for each object of the

agreement. If each article of the Bower agreement is considered singly, each such illegal element attaches to that single article, and the whole, therefore, is void.

“If any part of a single consideration for one or more objects, or of several considerations for a single object, is unlawful, the entire contract is void.”

Section 13-504, Revised Codes of Montana, 1947.

As the *Herrin* case, by necessary implication, recognized, a contract, to be separable under Montana law, must have a separate and legal consideration for the severed portion. Part of the consideration for each article of the Bower agreement is the promise of each party not to resist a divorce action brought by the other. Should either party resist, each and every article will fall. The promise not to defend goes to the heart of the agreement and each portion of it. It cannot be divided from any other promise.

If the consideration for an agreement is even partly illegal, the whole agreement is tainted unless the legal portion of the agreement is severable.

I Williston, Contracts (Rev. Ed. 1936) § 134.

On the face of the Bower agreement, even if each portion of the property settlement is considered apart, the agreement not to defend becomes part of the consideration for each such portion and comes under the provisions of Section 13-504, Revised Codes of Montana, 1947, quoted above. Put the other way, each portion of the property settlement is part of the consideration for the promise not to defend. This is expressly the case. The “Supplemental Agreement” states that its consideration is the

property settlement agreement (R. pp. 5-6). The agreement not to defend stands either as an illegal and collusive promise or as part of the illegal consideration for the whole agreement. It cannot be said that it is an insignificant part, since the parties agreed that the whole agreement should be negated if the promise not to defend were breached.

A contract connected with an illegal transaction will be enforced only if supported by an independent consideration so that the plaintiff does not require the aid of the illegal transaction to make out his case.

Gallagher v. Cornelius,

23 Mont. 27, 57 P. 447 (1899).

Connolly v. Union Sewer Pipe Co.,

184 U. S. 540, 46 L. Ed. 679 (1902).

Vancil v. Anderson,

71 Idaho 95, 227 P. (2d) 74 (1951).

In *Lewis v. Jackson and Squire, Inc.*, 86 F. Supp. 354 (D. C. Ark. 1949), App. Dis., 181 F. (2d) 1011 (8th Cir. 1950), plaintiffs, as trustees of the United Mine Workers Welfare Fund, attempted to recover unpaid funds required under certain agreements by which, the court decided, plaintiffs were made donee beneficiaries. The contracts contained union shop provisions illegal under Arkansas law. The contracts stated that the clauses were to be inter-dependent and the court placed great weight on the fact that the contracts would not have been executed without the union shop features. The court said that Arkansas law ruled the validity of the contracts and quoted the Arkansas Supreme Court to the effect that

if any part of an entire consideration for a promise or any part of the entire promise be illegal, the whole agreement is void (a statement of law much like 13-504, Revised Codes of Montana, 1947, quoted above). It was held that the union shop features were essential and inseparable parts of the agreement, rendering the whole unenforceable.

In the Bower agreement, the promise not to defend is inter-dependent upon each of the provisions of the property settlement. Nor would the property settlement agreement have been made without that promise, since the agreement is expressly voided should the promise not to defend be breached. The promise not to defend is an essential and inseparable part of the agreement, and is, of course, an illegal consideration for the agreement. If part of the consideration for a promise is illegal, the whole promise is voided.

In re Cummings' Estate,
89 Mont. 405, 298 P. 350 (1931).

Kelly v. Silver Bow County,
125 Mont. 272, 233 P. (2d) 1035 (1951).

Downey v. Northern Pacific Ry. Co.,
72 Mont. 166, 232 P. 531 (1924).

The general policy of courts is to strike down property settlement agreements when void elements of the agreements are of the essence of the contract. Thus, in *Shelton v. Stewart*, 193 Va. 162, 67 So. (2d) 841 (1951) the court examined and struck down an agreement between a wife and the plaintiff at a time when the wife was estranged from her husband. By the agreement the wife

was to sell plaintiff certain land upon which the husband enjoyed "dower" rights, and the wife covenanted that she would take the necessary steps to deliver an unencumbered title. The Supreme Court affirmed the lower court's decision that the effect and purpose of the covenant was that the wife divorce her husband and that this illegal covenant could not be separated from the rest of the contract and so rendered the whole agreement void. The Supreme Court said that agreements conditioned upon divorce or to facilitate procurement of divorce are void, and when the general purpose of an agreement is to facilitate divorce, the courts will not enforce any part of the agreement. The covenant was found to be of the essence of the agreement, so the whole agreement was void.

In *Giddings v. Giddings*, 167 Ore. 504, 114 P. (2d) 1009 (1941), decision adhered to on rehearing, 167 Ore. 504, 119 P. (2d) 280 (1941), Calvin Giddings, married to Harriet, but enamored of Minnie, asked two of his children to intercede with Harriet to obtain her consent to a divorce. An agreement was signed and Harriet did not appear or defend in the divorce action which resulted in a decree of divorce making no mention of the agreement. The agreement on its face contained no promise not to defend. When effort was made, however, to enforce the agreement against Calvin's estate, testimony established that Calvin could not have procured a divorce unless his wife had consented to the action. On the first hearing, the court determined the contract to be unenforceable. On rehearing, the court said that a promise not to defend is collusive and, when such a promise is part of the property

settlement, the settlement will be held void. Finding that the written agreement was only a part of the whole agreement, which contained a promise not to defend, the court ruled that the promise was at least part of the consideration for the property settlement and refused to enforce the property settlement agreement.

Goodwin v. Goodwin, 47 Ariz. 157, 54 P. (2d) 268 (1936) is to the effect that if the consideration for a property settlement is that one spouse will permit the other to get a divorce, the settlement is void.

In *Schley v. Andrews*, 225 N.Y. 110, 121 N.E. 812 (1919) plaintiff brought action to enjoin his former wife from executing upon a judgment against him. The parties, when married, had agreed that, if the wife would get a divorce, the husband would pay her \$200 a month for her life and that, as collateral security, he would confess judgment for \$35,000. It was expressly agreed that the agreement and the judgment would be of no effect if the divorce was not obtained. When the wife obtained the divorce, the agreement and the judgment were delivered to her. When the wife remarried, her former husband stopped the monthly payments and the woman took steps to execute the judgment. Plaintiff's action was dismissed in the lower court, but the Court of Appeals held that the execution should be vacated and defendant enjoined from further attempts to enforce the judgment. A concurring judge thought the judgment itself should be vacated. The court found the agreement and the confession of judgment to be illegal because they were intended to induce a divorce. The judgment, being supported by illegal consideration,

was also void, and the court said it would not enforce the judgment because to do so might infer that approval was being given the illegal judgment.

Hettich v. Hettich, 304 N.Y. 8, 105 N.E. (2d) 601 (1952), citing the *Schley* case, held that parties may not use the courts for the purpose of enforcing executory portions of illegal contracts.

The following principles are submitted:

1. The property settlement agreement must be supported by valid consideration. No such consideration exists in the present case.

2. If illegal consideration is of the essence of an agreement, no recovery may be had thereon.

Brown v. Brown, 8 Cal. App. (2d) 364, 47 P. (2d) 352 (1935). The illegal elements of the Bower agreement go to the heart of the agreement, rendering the whole and each portion thereof void.

3. If consideration for a promise is illegal in whole or in part, the promise is unenforceable. The illegal elements of the Bower agreement run expressly to the entire agreement and to each part and render each portion thereof void.

4. In order for Appellee to show she has any rights under the Bower agreement, she must show the conditions upon which the agreement is to become effective have been met, and therefore she must affirmatively assert the very facts which establish the collusive and illegal nature of the agreement.

D. THE APPELLANT HEREIN CANNOT BE BOUND BY THE PROPERTY SETTLEMENT AGREEMENT.

Since the Bower agreement is wholly void and of no effect, it is, in fact and law, not an agreement at all.

“The rule is well stated as, ‘A void contract is no contract at all; it binds no one and is a mere nullity. * * * It requires no disaffirmance to avoid it and it cannot be validated by ratification. A contract wholly void is void as to everybody whose rights would be affected by it if valid.’ 12 Am. Jur., ‘Contracts,’ sec. 10, p. 507. ‘A void contract need not be rescinded.’ 12 Am. Jur., ‘Contracts,’ sec. 437, p. 1017.”

Hames v. City of Polson,

123 Mont. 469, 484, 215 P. (2d) 950, 958 (1950).

This being the case, neither Appellant nor the insurance company is in any way bound by the Bower agreement. We return, then, to the proposition that when the insured has retained the right to change the beneficiary of an insurance policy, the named beneficiary has a mere expectancy and does not possess any vested right or interest during the life of the insured.

46 C. J. S., Insurance § 1173 b (2).

Doering v. Buechler,

146 F. (2d) 784 (8th Cir. 1945).

Grimm v. Grimm,

26 Cal. (2d) 173, 157 P. (2d) 841 (1945).

Joseph Edward Bower's right to change the beneficiary of the insurance policy in question was not defeated by the property settlement agreement in question, it being null and void. Appellee, basing her claim on this agreement and asserting no other means by which Bower's

reserved right was or could have been defeated (R. pp. 8-9), bases her claim upon a nullity.

Appellant's claim to the proceeds of the policy is based upon the fact that Joseph Edward Bower, acting pursuant to the provisions of the insurance policy, changed the beneficiary of the policy and designated Appellant as beneficiary. Appellant was still the designated beneficiary at the time of Bower's death (R. p. 8).

The courts will not aid a party to profit by his illegal transaction. Since Appellee relies on an illegal contract in asserting her imagined rights, Appellant is entitled to assert and establish the illegality of that contract.

Dorrell v. Clark.

90 Mont. 585, 4 P. (2d) 712 (1931).

Virginia K. Bower, as the duly and lawfully designated beneficiary at the time of the death of the insured, is entitled to the proceeds of the policy.

CONCLUSION

The facts, particularly the express provisions of the Bower agreement indicate that the agreement was entered into with the intention of facilitating the procurement of a divorce, was conditioned upon the obtaining of a decree of divorce and upon the promise of both parties not to defend against a divorce.

This being the case, the agreement is and was when made, wholly void and of no effect.

Since the illegal consideration, promises, and conditions are of the essence of the agreement and lie at the heart of each portion thereof, and since the promise not to defend is an illegal consideration for each such portion, the

agreement is wholly void and cannot be separated into divisible agreements with the legal promises supported only by legal consideration.

In fact, there is no valid and legal consideration for the agreement which is supported only by the above-mentioned illegal consideration.

Since Appellee bases her claim upon the illegal, indivisible agreement, she has no claim at all, the agreement being of no force or effect whatsoever.

The agreement being null and void, the insured was not bound by it. Appellee could not thereunder acquire any vested right or interest in the proceeds of the insurance policy involved, and had, prior to the time the beneficiary was changed, only an expectancy.

The agreement being null and void, the insured was in no way prevented from exercising his reserved right to change the beneficiary of the policy, and the designation of Appellant is due form deprived Appellee of her expectancy and transferred such rights to Appellant.

Appellant being the lawful and proper beneficiary of the policy at the time of insured's death is entitled to the proceeds of the policy.

It is therefore respectfully submitted that the judgment of the lower court should be reversed and that judgment should be entered for the plaintiff in interpleader and Appellant, Virginia K. Bower, for the full amount of the insurance policy involved, less attorney fees duly awarded by the court below to Western Life Insurance Company.

Respectfully submitted,

H. Cleveland Hall

Edw. C. Alexander

Attorneys for Appellant.

Service admitted this.....day of....., 1958.

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Attorney for Appellee.

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APPENDIX I

TABLE OF EXHIBITS:

EXHIBIT: *	REFERENCE IN RECORD:
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Agreement of August 15, 1946, between Mabel N. Bower and Joseph E. Bower.....	5, 22-28
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Supplemental Agreement of same date between the above parties.....	5-7
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Western Life Insurance Company Policy No. 89692, issued September 27, 1938, upon life of Joseph Edward Bower	4, 13-18
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* Each of the exhibits set forth above were made part of the record by reference or inclusion in the Agreed Statement of Facts of the plaintiff and defendant in interpleader, and are not otherwise identified by letter or number.

APPENDIX II

1. Agreement between the parties in *Grush v. Grush*, 90 Mont. 381, 3 P. (2d) 402 (1931):

"Whereas, the parties above named are husband and wife and disagreements have arisen between them resulting in application for divorce and for the custody of the children of the parties thereto by and on behalf of Delbert I. Grush, the plaintiff, against Ruth Grush, the defendant; and,

Whereas, the parties hereto are desirous of making a full and complete settlement of all property interests and a full and complete agreement as to the amount of alimony to be paid by the plaintiff to his wife.

Therefore, in consideration of the premises and by way of compromise, IT IS HEREBY AGREED as follows,

First: That the said plaintiff does hereby agree to

execute and deliver to the said defendant a full, complete and unconditional Deed to all the Real Estate now owned by him in the City of Anaconda, in Deer Lodge County, State of Montana, and described as follows, to-wit:

* * * * *

Second: That the said plaintiff does hereby agree to execute and deliver to the said defendant a Bill of Sale of all the furniture now contained and owned by the said parties and situated in the property hereinabove described, to be hers absolutely and unconditionally.

Third: That the said plaintiff does hereby agree to pay to the defendant the sum of Fifty (\$50.00) Dollars per month, as alimony; that is the sum of Fifty (\$50.00) Dollars for each and every month for a period of Eight (8) months beginning March 1st, 1930. That thereafter the said plaintiff does hereby agree to pay to the defendant the sum of Seventy-five (\$75.00) Dollars, per monty (sic.) for each and every month. Payments last mentioned to begin at the end of eight (8) months and continue until such payments are ordered discontinued by a court of competent jurisdiction. Said payments hereinabove mentioned shall be made on the 1st day of each and every month.

Fourth: The defendant agrees that the plaintiff shall have the care, maintenance, control and custody of the children of the parties hereto and upon the making of the payments hereinabove mentioned and conveying the property hereinabove mentioned hereby releases the plaintiff from all further and other payments that she may have now, or hereafter claim, and that the defendant is hereby released from contributing anything to the support and maintenance of the children of the parties hereto, said burden being assumed entirely by the plaintiff above named.

IN WITNESS WHEREOF, the parties to these presents have hereunto set their hands and seals this 25th day of February, A. D. 1930."

(*Grush v. Grush*, supra, Transcript, pp. 24-26)

2. Agreement between the parties in *Herrin v. Herrin*, 103 Mont. 469, 63 P. (2d) 137 (1936):

"THIS AGREEMENT, Made and entered into this 21st day of May, 1934, by and between HARLAND J. HERRIN and his wife, MARY HERRIN, both of the City of Helena, Lewis and Clark County, State of Montana, WITNESSETH:

THAT, WHEREAS, the parties hereto have lived together as husband and wife for a period of over twenty-six years, and have now determined upon a separation and divorce by reason of incompatibility, and there being no issue of said marriage:

NOW, THEREFORE, in consideration of the sum of One Dollar (\$1.00) and other good and valuable considerations passing between the parties, the following property settlement has been mutually agreed to between the parties; and in consideration of the transfer and delivery to Mary Herrin by Harland J. Herrin of the property hereinafter particularly described, the said Mary Herrin agrees to release and relieve the said Harland J. Herrin from the payment of any costs or charges incurred incident to divorce proceedings or by reason of alimony for her support to which she would otherwise be entitled, hereby acknowledging full and complete satisfaction of all of her property rights whatsoever, and agreeing that in any decree of divorce entered, that the same shall recite that a property settlement has been mutually agreed upon between the parties satisfactory to each and that as a result of which the said Harland J. Herrin shall be relieved from the payment of all alimony, costs, charges, or other claims and demands whatsoever, and that thereafter the said Mary Herrin will desist and refrain from making any demands or claims whatsoever against the said Harland J. Herrin, or his estate.

The property hereinabove referred to to be transferred by the said Harland J. Herrin to Mary J. Herrin,

his wife, in full settlement under the terms of this agreement, is particularly described as follows:

1. The sum of Three Hundred Dollars (\$300) in cash;

2. Delivery by Harland J. Herrin to Mary Herrin, of the promissory note of her brother Brian D. O'Connell, for the sum of Two Thousand Dollars (\$2,000.00), less payments which have been made thereon;

3. The complete transfer of all of the rights and interest of the said Harland J. Herrin in and to an Oil Service Station in the City of Great Falls, operated by her brother Roy O'Connell;

4. Delivery by the said Harland J. Herrin of a certain trunk containing linens and other personal effects, in his possession, being the property of the said Mary Herrin.

Receipt of all of the above and foregoing described property by Mary Herrin is hereby acknowledged at the time of the execution of this instrument.

IN WITNESS WHEREOF, both parties hereto have hereunto subscribed their names to this contract, in duplicate, the day and year first hereinabove written."

(*Herrin v. Herrin*, supra, Transcript, pp. 13-14)

3. Testimony in *Herrin v. Herrin*, supra:

DIRECT EXAMINATION OF JUDGE GALEN

* * * * *

"Q. Judge Galen, I hand you plaintiff's exhibit A and will ask you if you can identify that for us?"

"A. Yes. Plaintiff's exhibit A is a property right settlement which I prepared at the request of Mary Herrin, Mary Ellen Herrin and H. J. Herrin. At the time it was prepared they were separating and going to a divorce decree."

* * * * *

"Q. Judge Galen, in order to shorten the inquiry as much as possible, I wish you would relate to the court the circumstances leading up to and surrounding

the making and execution of those documents, in your own way."

* * * * *

"A. There was nothing to it, excepting when they had come to a determination to get a divorce and had discussed a property settlement, I simply drew the contract, that is all. There wasn't anything further than that."

"Q. Tell the court whether or not it was signed in your presence."

"A. Yes, it was."

* * * * *

CROSS EXAMINATION OF JUDGE GALEN

"Q. Would you say the purpose of the separation agreement was to facilitate the divorce?"

"A. Well, they had agreed upon a divorce and this was simply a property settlement; they had determined upon a divorce."

"Q. In a general way was it to facilitate the divorce, would you say?"

"A. I would say they were to go ahead with the divorce; that is all there was to it. I recall they had several meetings in my office and finally, with reference to cash, Holly had offered to give her \$200.00. They came up there and had Roy and his wife and talking further about the matter, she said \$300.00 and I said: 'Go ahead and give her the extra \$100.00.' He went through and turned it over to me. I put the money to my account and afterwards, when she demanded it I gave her my check for it."

"Q. Did she always intimate to you, Judge Galen, she wanted to go back to Mr. Herrin?"

"A. From her correspondence, yes."

"Q. And by your conversations with Mr. Herrin, did you state to him that she wanted to go back to him?"

"A. I wrote him those letters and I talked to him about the matter of her expressed wishes. As late as yesterday afternoon, Roy was in my office and stated he believed Mamie would go back to Holly right now. I said: 'That is fine and dandy with me.' So, when Holly came in I tried to get him to take the telephone and talk to her but he wouldn't. He said it was too late. So right up to yesterday, as far as I know, Mamie was still making overtures to live with him."

REDIRECT EXAMINATION OF JUDGE GALEN

"Q. Do you mean to say they had agreed to get a divorce?"

"A. No but they were going to get a divorce and had come to a property settlement."

"Q. This contract contains no agreement to get a divorce."

"A. There was no matter of agreement to get a divorce; this was a property settlement in contemplation of a divorce. The instrument recites on its face that because of incompatibility they had concluded on a divorce."

"Q. It doesn't even recite that, does it, Judge?"

"A. It says: 'That, whereas, the parties hereto have lived together as husband and wife for a period of over 26 years, and have now determined upon a separation and divorce by reason of incompatibility.'"

"Q. They had reached the determination to obtain a divorce, apparently, according to the recitals."

"A. They had determined upon a separation and divorce."

"Q. This was a property settlement in the light of that determination."

"A. No, sir, it wasn't an agreement to get a divorce but in consequence of their separation and contemplated divorce this was a property settlement as it states on its face. That is all there was to it, from meetings and

discussions of one kind and another, before this was ever brought about. Then this stuff was delivered to her as I say. The contents of the trunk, as I say, I know nothing about that but this other stuff was delivered to her."

"MR. TOOMEY: That is all."

RECROSS EXAMINATION OF JUDGE GALEN

"Q. This is simply a separation agreement for the purpose of facilitating the divorce."

"A. This recites on its face it is a property settlement in contemplation of their separation and divorce."

Herrin v. Herrin, supra, Transcript, pp. 81, 83, 86, 87, 88, 89.

4. Testimony of plaintiff, defendant, and another witness in *Herrin v. Herrin*, supra:

a. Cross examination of plaintiff:

"Q. She never at any time agreed, at the time of the separation agreement, to give you a divorce, did she?"

"A. No."

"Q. There was never any agreement when you paid her any money that she should give you a divorce?"

"A. No, she wanted so much and finally we agreed upon it."

Herrin v. Herrin, supra, Transcript, p. 59.

b. Cross examination of Mrs. Herrin:

"Q. In this settlement contract, you acknowledge receiving all of the property referred to."

"A. Yes, I did but I didn't though."

"Q. Just a minute, please! I say you did acknowledge receipt of all of the property in the settlement contract and released Mr. Herrin accordingly."

"A. No, I signed it but, I went down one night to Mr. Galen's to see what he was doing. I didn't know there was going to be a divorce but we had agreed, Mr.

Herrin and I, to a separation. When I went down and looked at the paper, I said to Mr. Galen, 'I didn't know we were going to get a divorce. When did you conclude to get a divorce?' He said, 'Mr. Herrin came back, after your agreement and said he would have to have a divorce.' Of course, I was just a nervous wreck and Mr. Galen said, 'You had better sign this; you are a lot better off to get rid of him.' He said, 'You can do as you please, but you are a lot better off than to have Mr. Herrin with you.' I didn't want to do that but I was just a nervous wreck and I signed. I said, 'I haven't got the linens' and he said, 'He has given his word of honor you would get those linens.' I said, 'Word of honor, he has no word of honor.' He said, 'He told me you would get those linens.' "

"Q. Did any of this conversation take place in the presence of Mr. Herrin?"

"A. Mr. Herrin wasn't there but my brother was."

"MR. TOOMEY: I move to strike the testimony as hearsay, I have been unable to stop the witness."

"THE COURT: It may be stricken."

Herrin v. Herrin, supra, Transcript, p. 108.

c. Direct examination of Mrs. Galen:

"MR. RANKIN: It is only, if the court please, he said she wouldn't come back. (Q) What have you to say about it?"

"THE COURT: This is what was said since September, 1932?"

"MR. RANKIN: Yes."

"A. Yes, I heard Mrs. Herrin remark as late as last winter that she would be willing, very willing. She didn't want a divorce but wanted to have her husband's companionship."

"Q. And likewise whether she didn't want a divorce by reason of her faith?"

"A. Yes, she was concerned about it, being against her religious conventions, it was rather a disgrace."

"MR. TOOMEY: I move the last answer of the witness be stricken as immaterial and not responsive to the question and an attempt to inject foreign matter into the testimony."

"THE COURT: It may be stricken."

Herrin v. Herrin, supra, Transcript, pp. 91-92.

1. Agreement between the parties in *Ryan v. Ryan*, 111 Mont. 104, 106 P. (2d) 337 (1940):

"THIS AGREEMENT, entered into this 1st day of June, 1938, by and between Phillip E. Ryan, hereinafter called First Party, and Anna C. Ryan, his wife, hereinafter called the Second Party, both residing in Great Falls, Cascade County, Montana, WITNESSETH:

That, whereas, the parties hereto are now husband and wife, but differences have arisen and do now exist between them, the result being that the said parties have lived separate and apart since on or about the 15th day of January, 1938, and have become definitely and finally convinced that it will be impossible for them now, or hereafter, to live together as man and wife, and the second party has heretofore instituted an action against the first party for separate maintenance, and the first party has appeared in said action and filed his cross complaint, requesting that he be granted a divorce, which said action is now pending in the District Court of the Eighth Judicial District of the State of Montana, in and for the County of Cascade.

NOW, THEREFORE, in consideration of the foregoing premises, both parties hereto mutually covenant and agree as follows:

1. The parties hereto have already divided their personal property and own no real property, and title to such personal property now in the possession of each is hereby confirmed and shall be held by each free and clear of the demands of the other party hereto.

2. First Party shall pay to the second party as and for her support, the sum of Thirty-two Dollars and Fifty Cents (\$32.50) per month, said sum payable monthly, and the first payment thereof to commence as of May 1st, 1938, and a like sum on the first of each and every month hereafter during the joint lives of the parties hereto, or until re-marriage of second party.

3. It is further understood and agreed that the parties hereto have four adult children now living, but that all of said children are of age.

4. In consideration of the foregoing, second party does hereby agree to release and relinquish all other right of interest, dower right, the right of an heir, or otherwise, which she might now have or hereafter acquire against the person or property of the first party by virtue of the marriage existing between the parties hereto.

IN WITNESS WHEREOF, said parties have hereunto set their hands and seal this 1st day of June, 1939."

Ryan v. Ryan, supra, Transcript, p. 9-11.

IN THE

**United States Court of Appeals
For the Ninth Circuit**

VIRGINIA K. BOWER,

Appellant,

vs.

MABLE CLAIRE BOWER, also known as and
called Mabel N. Bower,

Appellee.

Brief of Appellee, Mable Claire Bower

Upon Appeal from the District Court of the
United States, for the District of Montana

WILLIAM A. BROWN,
Helena, Montana,
Attorney for Appellee.

Filed....., 1958

..... Clerk.



FILED

JAN 31 1958

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IN THE
**United States Court of Appeals
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vs.

MABLE CLAIRE BOWER, also known as and
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Appellee.

Brief of Appellee, Mable Claire Bower

Upon Appeal from the District Court of the
United States, for the District of Montana

WILLIAM A. BROWN,
Helena, Montana,
Attorney for Appellee.

IN THE
**United States Court of Appeals
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VIRGINIA K. BOWER,

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vs.

MABLE CLAIRE BOWER, also known as and
called Mabel N. Bower,

Appellee.

Brief of Appellee, Mable Claire Bower

Upon Appeal from the District Court of the
United States, for the District of Montana

WILLIAM A. BROWN,
Helena, Montana,
Attorney for Appellee.

I.

STATEMENT OF ISSUE

This is an appeal from a judgment of the lower
court in which the cause was submitted upon an

agreed statement of facts. The two parties involved had been the wives of the late Joseph Edward Bower. During the time that the appellee and the husband were married he took out a life insurance endowment policy for Ten Thousand Dollars (\$10,000.00) with the Western Life Insurance Company, naming his wife (appellee) beneficiary. They had two sons and a daughter. Realizing that they could no longer live together as man and wife, they entered into a divorce settlement agreement settling the care, custody and control of the children, making a property settlement and providing for costs and fees (Tr. pp. 22-23). The preamble of this agreement stated their "desire to settle and adjust amicably" (Tr. p. 22) all of their differences.

In paragraph VII of that agreement it was provided that the proceeds of the insurance policy would be divided equally, but that in the event the husband should die, all benefits should be payable to his wife (appellee). That same day, a supplemental agreement was entered into between the parties whereby they agreed that if one party did not institute the divorce proceedings within a certain specified time, then the other party had the right to do so (Tr. pp. 34-35).

Appellee obtained the divorce by default in October 1946. On December 7, 1949, the husband married the appellant, and immediately thereafter, made his second wife the beneficiary under

the policy. This was done without the knowledge of his first wife with whom he had made the contract of divorce settlement.

The husband died in September 1955, following which the two wives tried to collect the insurance policy. The Western Life Insurance Company brought an action in interpleader and deposited the proceeds of the policy with the Clerk of the lower court. The two wives litigated the question over whom was entitled to the money and on July 13, 1957, the Hon. W. J. Jameson, United States District Judge for Montana, made and entered his order herein finding that while the separation agreements were void as against public policy, nevertheless, paragraph VII which provided for the insurance policy as noted above, was severable. (Tr. pp. 31-45). Thereafter on August 19, 1957, the court made and entered its judgment accordingly.

At this point, we respectfully call the court's attention to the fact that this case was submitted on agreed statement of facts, and at no time during the course of this case has there been any argument as to these facts. Therefore, this case presents the simple question of whether Mable Claire Bower, the divorced wife and mother of the children, or Virginia K. Bower, the second wife who was not even a party to the divorce settlement contract, should receive the proceeds from the insurance policy.

II. ARGUMENT

A. The agreement is severable.

That property settlement agreements may create a vested equitable interest in an insurance policy where sound equities exist in favor of the beneficiary, has long been a well settled rule in jurisprudence.

46 C. J. S. Sec. 1175, c (1) Pg. 71;

2 Appleman Insurance Law and Practice
Sec. 922;

175 A. L. R. 1220

We call special attention to a decision from the Supreme Court of California that is strangely similar in its facts to the case here. The court decree was entered after a marriage settlement agreement was made, but after the decree of court, the insured wrote to his company telling them that he had been divorced, but that he wanted his estranged wife to remain the beneficiary. He did not use the word "irrevocably" and later he changed the beneficiary to his second wife. There the court held (as did Judge Jameson below) that the first wife had a vested equitable interest which could not be divested.

Shoudy vs. Shoudy

55 Cal. App. 344, 203 Pac. 433

The question is well stated in American Jurisprudence as follows:

"Equities may arise in favor of the beneficiary named in a life insurance policy which

will deny the insured the right to change the beneficiary, as, for example, where the insured, *for a valuable consideration, estops himself from changing his designation of the beneficiary.* (Emphasis ours).

29 Am. Jur. 1314, p. 983

McDonald vs. McDonald
(Ala.), 102, So. 38

Thompson vs. Thompson
156 F. (2d) 581

Ratsch vs. Rengel
180 Md. 196, 23 A. (2d) 680

Using the words of the lower court there can be no question that "factual distinctions between the instant case and those cited do no violence to the rule of law which is applicable here." (Tr. p. 40, the divorce settlement agreement is severable).

B. The Montana Cases.

We presume to cite the opinion of the lower court not only to sustain our arguments, but to provide this court with a very excellent brief of our contention. (Tr. pp. 31-47, 153 F. Supp. 25).

Appellant would make much of the holding of the lower court that the property settlement agreements are null and void and for this reason they are not severable. In support of this argument, the cases of *Ryan vs. Ryan*, 111 Mont. 104, 106 Pac. (2d) 337; *Herrin vs. Herrin*, 103 Mont. 469, 63 Pac. (2d) 137; *Grush vs. Grush*, 90 Mont. 381, 3 Pac. (2d) 402 are cited, apparently with the thought that they sustain appellant's argument

that the separation agreements cannot be severed. It seems strange that these same cases were cited with favor by the lower court to sustain the opposite conclusion.

For this reason, we quote these Montana cases again and point out in the words of the court, exactly what they mean. It is our position that the facts of the case here before the court come squarely under the decisions of the Grush, Herrin and Ryan cases cited above.

All three of these cases raise the point of severability of the contract. It was pointed out in the Grush Case (*supra* 388), that for the court to grant plaintiff the relief which he sought (to annul that portion of the divorce decree requiring him to pay alimony) "might serve to assist plaintiff in perpetrating a fraud upon defendant and thus the court become an instrument of injustice."

In the instant case, we must consider Virginia K. Bower in the same position as the late Joseph Edward Bower, because she is claiming the benefits of the insurance contract which resulted when he attempted to make her the beneficiary. But he lost the right to change the beneficiary when he signed the solemn separation contract with his first wife, Mable Claire Bower.

The court stated a similar situation in the Ryan Case, *supra*, as follows:

"In essence, this is defendant's position:

That he agreed to pay plaintiff the support money for the fraudulent purpose of obtaining a collusive divorce with defendant's assistance; that his promise had brought him the desired result but should now be held unenforceable as being against public policy and therefore void."

Ryan vs. Ryan, 111 Mont. 104 at 108.

The court goes on to answer this question by saying:

"In that case (*Grush vs. Grush*, 90 Mont. 381, 3 Pac. (2d) 402), this court said that the agreement savored of collusion and was opposed to public policy and a fraud upon the court, and that the decree if based upon it might be set aside by the court sua sponte; but that by sustaining plaintiff's motion and permitting the divorce decree to stand the court would in effect sanction his obtaining it by keeping plaintiff away from court by fraudulent promises to extrinsic fraud, and thus might serve to assist him in perpetrating a fraud upon the plaintiff and so make itself an instrument of injustice; that it could not justifiably annul the alimony provision and allow the divorce to stand; that public policy would not seem to require the annulment of the divorce, since neither party requested it and apparently if contested the only change would have been in the ascertainment of the offending party; that plaintiff under the circumstances, having accepted the benefit of the decree, could not be permitted to evade its burdens agreed to by him but should properly be left where he had voluntarily placed himself by agreement.

"Defendant contends that the *Grush Case* is not applicable here. But the only material difference is that in the *Grush case* the question of fraud was raised defensively to prevent the moving party from benefiting by the fraud,

whereas in this case it is raised affirmatively by the moving party for his own benefit. Certainly here, to say the least, the equities in favor of the wife are no less compelling than in the Grush Case."

Ryan vs. Ryan, supra, at page 109.

The question is finally and completely resolved by the Supreme Court of Montana in the Herrin Case. There the Court held definitely and without equivocation that such a contract as is here presented is severable.

"But we think it repugnant to sound principles of equity to permit one to profit by the provisions of such an agreement and then avoid its objectionable parts by invoking the rule mentioned, and we therefore hold the contract to be separable. This conclusion is one of first impression in this jurisdiction in actions of this nature so far as our research reveals; but there is authority for such a rule in actions at law, (*Mattison v. Connerly*, 46 Mont. 103, 126 Pac. 851; *Purdin v. Westwood Ranch & Livestock Co.* 67 Mont. 553 Pac. 326; *United States Building & Loan Assn. v. Burns*, 90 Mont. 402, 420, 4 Pac. (2d) 703), and we think such a holding is fair and equitable and does substantial justice between the parties. The contract is therefore held to have been entered into for the purpose of facilitating a divorce, and as to that it is void as contrary to public policy, but as to the property settlement it is valid and binding upon both parties." (Emphasis ours).

Herrin vs. Herrin, supra at 473

It appears that any further citation of authority would unreasonably burden the court.

III.

CONCLUSION

Stripped of all of its verbiage, this case becomes comparatively simple. Joseph Edward Bower and his first wife signed a contract stating that they were having marital difficulties, and that they wished to settle all of their differences over property, alimony and custody of their children amicably.

A supplemental agreement was executed by the parties on the same date as the original and provided that if the first wife did not institute divorce proceeding by a certain date, the husband could do so.

The prime agreement in paragraph VII set forth the existence of the insurance policy here under discussion which stated how its proceeds should be disposed of. The court held the separation agreements to be null and void, but further held that paragraph VII was severable and that it created a vested equitable interest to the proceeds of the insurance policy in Mable Claire Bower.

We therefore respectfully submit that the proceeds of the policy deposited with the lower court are by law the property of the appellee, and that the decision and judgment of the lower court should be affirmed.

Respectfully submitted,
WILLIAM A. BROWN,
Attorney for Appellee.

No. 15717

United States
Court of Appeals
For the Ninth Circuit

VIRGINIA K. BOWER,

Appellant,

vs.

MABLE CLAIRE BOWER,

Appellee.

Transcript of Record

Appeal from the United States District Court
for the District of Montana.

FILED

DEC - 9 1957



No. 15717

**United States
Court of Appeals**
For the Ninth Circuit

VIRGINIA K. BOWER,

Appellant,

vs.

MABLE CLAIRE BOWER,

Appellee.

Transcript of Record

Appeal from the United States District Court
for the District of Montana.

NAMES AND ADDRESSES OF ATTORNEYS

For Appellee, Mable Claire Bower:

WILLIAM A. BROWN,
17 Holter Block,
Helena, Montana.

For Appellant:

HALL, ALEXANDER and KUENNING,
Strain Building,
Great Falls, Montana.

In the District Court of the United States, for the
District of Montana, Great Falls Division

Civil No. 1828

WESTERN LIFE INSURANCE COMPANY, a
Corporation,

Plaintiff,

vs.

VIRGINIA K. BOWER and MABLE CLAIRE
BOWER, Also Known as and Called MABEL
N. BOWER,

Defendants.

VIRGINIA K. BOWER,

Plaintiff in Interpleader,

vs.

MABLE CLAIRE BOWER, Also Known as and
Called MABEL N. BOWER,

Defendant in Interpleader.

AGREED STATEMENT OF FACTS

There being no issues of fact between the parties to this action, and the said parties desiring to submit the agreed facts to the Court for its decision as expeditiously as possible, it is hereby stipulated and agreed between the above-named plaintiff in interpleader, Virginia K. Bower, and the above-named defendant in interpleader, Mable Claire Bower, also known as and called Mabel N. Bower, through their respective counsel, that said action be and the same

is hereby submitted to the Court for its decision and judgment upon the following written statement of facts, which have been agreed upon between the parties to this action.

I.

Plaintiff at all times herein mentioned has been and now is a resident and citizen of the State of Montana. Defendant is a resident and citizen of the State of Texas. The amount involved in this action is in excess of Three Thousand Dollars (\$3,000.00), excluding interest and costs.

II.

That heretofore, on or about the 26th day of September, 1938, the Western Life Insurance Company, a corporation, in consideration of the payment to it by Joseph Edward Bower of the sum of \$4,680.50 issued and delivered to said Joseph Edward Bower its single premium endowment policy No. 89692 in the sum of \$10,000.00, naming and designating the defendant, Mable Claire Bower, then the wife of said insured, as the beneficiary thereof, payable to said insured, if living, on the 27th day of September, 1970, and in the event of his death prior thereto to said defendant, Mable Claire Bower, his then wife and the beneficiary named in said policy, if living at the time claim is made, reserving to himself the right to change the beneficiary of said policy from time to time, a copy of which policy is attached to the complaint of Virginia K. Bower, marked Exhibit "A" and is by this reference made a part hereof.

III.

Thereafter and on the 15th day of August, 1946, the said Joseph Edward Bower and the defendant, under the name of Mabel N. Bower, entered into a property settlement agreement, a copy of which agreement is attached to defendant's answer and cross-complaint herein as Exhibit "A," and is by this reference made a part hereof.

IV.

That at the same time and place that the said Joseph Edward Bower and the defendant entered into said property settlement agreement aforesaid, and as a part of the same transaction, the said Joseph Edward Bower and the defendant entered into and executed a so-called "Supplemental Agreement" in words and figures as follows:

"Supplemental Agreement

This Supplemental Agreement, made and entered into this 15th day of August, A.D. 1946, by and between Mabel N. Bower, Party of the First Part, and Joseph E. Bower, Party of the Second Part, both of Great Falls, Cascade County, Montana.

Witnesseth:

Whereas, the parties to this supplemental agreement, being husband and wife, have heretofore, on the same date, entered into an Agreement with reference to property settlement, the care, custody and control of their minor children, support money for the same and costs and fees of any divorce proceedings

instituted by either party hereto against the other, and in consideration thereof,

It Is Hereby Specifically Understood and Agreed that unless the First Party institutes a divorce proceedings against the Second Party on or before the 1st day of October, 1946, then, in that event, the Second Party shall have the right to institute such divorce proceedings against the First Party.

It Is Further Understood and Agreed that in the event that either party resists the divorce proceedings instituted against them by the other party, that, then in that event, said property agreement shall be cancelled and considered null and void and not be used by either party in any such divorce proceedings.

It Is Further Agreed and Understood that the Judge of any Court which may hear such divorce proceedings is hereby authorized, if the Court deems it warranted, to include in any decree of divorce any part or portion of said property settlement agreement.

In Witness Whereof the parties hereto have hereunto set their hands and seals the day and year first above mentioned.

MABEL N. BOWER,

Party of the First Part.

J. E. BOWER,

Party of the Second Part.

State of Montana,
County of Cascade—ss.

On this 15th day of August, A.D. 1946, before me, O. B. Kotz, a Notary Public, personally appeared Mabel N. Bower and Joseph E. Bower, known to me to be the persons whose names are subscribed to the within Supplemental Agreement and acknowledged to me that they executed the same.

O. B. KOTZ,
Notary Public for the State
of Montana.”

V.

Pursuant to said agreements aforesaid the defendant, Mabel N. Bower, on September 26th, 1946, instituted an action for divorce against the said Joseph Edward Bower by the filing of her complaint in the District Court of the Eighth Judicial District of the State of Montana, in and for the County of Cascade. Summons was issued and served upon the said Joseph Edward Bower on September 27, 1946. The said Joseph Edward Bower did not appear in said action in resistance to defendant's complaint and on the 24th day of October, 1946, his default was entered in said action, and on said day a decree of divorce was made and given by said District Court of Cascade County in favor of said defendant herein, Mabel N. Bower.

VI.

That on the 15th day of August, 1946, the said Joseph Edward Bower was in the exclusive pos-

session of said policy of insurance so issued by the Western Life Insurance Company and that at all times subsequent thereto until the date of his death on September 29th, 1955, he remained in possession thereof. That subsequent to the 24th day of October, 1946, the said Joseph Edward Bower married the plaintiff herein, Virginia K. Bower, and that on or about the 7th day of December, 1949, in the exercise of his reserved right to change the beneficiary named in said insurance policy, he changed such beneficiary from Mable Claire Bower, his former wife, to the plaintiff herein, Virginia K. Bower, his then wife, substituting the said Virginia K. Bower in the place of said defendant, Mable Claire Bower, as the beneficiary of said policy of insurance, and that plaintiff herein at all times since and now is the named beneficiary therein.

VII.

That the said Joseph Edward Bower died on or about the 29th day of September, 1955, leaving surviving him his said wife, the plaintiff herein, Virginia K. Bower, who made proof of the death of said insured to said Western Life Insurance Company and made demand upon said insurance company for payment to her of the proceeds of said policy of insurance amounting to the sum of \$10,093.17.

VIII.

That the defendant, Mable Claire Bower, also known as Mabel N. Bower, bases her claim and right to the proceeds of said insurance policy upon the agreements set forth and described in paragraphs

III and IV hereof. That the plaintiff, Virginia K. Bower, was not a party to said agreements and was not in any way involved or interested therein.

MABLE CLAIRE BOWER,

Also Known as and Called
Mabel N. Bower,

By /s/ WILLIAM A. BROWN,

Her Duly Authorized At-
torney.

VIRGINIA K. BOWER,

By /s/ H. C. HALL,

Her Duly Authorized At-
torney.

[Endorsed]: Filed November 14, 1956.

[Title of District Court and Cause.]

COMPLAINT IN INTERPLEADER

Comes Now Virginia K. Bower, pursuant to Order of Interpleader entered herein, and, for her complaint in interpleader against Mable Claire Bower, also known as and called Mabel N. Bower, alleges:

I.

Plaintiff at all times herein mentioned has been and now is a resident and citizen of the State of Montana. Defendant is a resident and citizen of the State of Texas. The amount involved in this action

is in excess of Three Thousand and no/100 (\$3,000.00) Dollars excluding interest and costs.

II.

That heretofore, on or about the 26th day of September, 1938, the Western Life Insurance Company, a corporation, in consideration of the payment to it by Joseph Edward Bower of the sum of \$4,680.50 issued and delivered to said Joseph Edward Bower its single premium endowment policy No. 89692 in the sum of \$10,000.00, naming and designating the defendant, Mable Claire Bower, then the wife of said insured, as the beneficiary thereof, payable to said insured, if living, on the 27th day of September, 1970, and in the event of his death prior thereto to said defendant, Mable Claire Bower, his then wife, and the beneficiary named in said policy, reserving to himself the right to change the beneficiary of said policy from time to time, a copy of which policy is hereto attached, marked Exhibit "A" and by this reference made a part hereof.

III.

That by judgment and decree of divorce duly made, given and entered in the District Court of the Eighth Judicial District of the State of Montana in and for the County of Cascade on the 24th day of October, 1946, the marital relation theretofore existing between the said defendant, Mable Claire Bower, and said Joseph Edward Bower was terminated and dissolved and thereafter in the exercise of his reserved right to change the beneficiary of

said policy of insurance, the said Joseph Edward Bower, on or about the 7th day of December, 1949, changed the beneficiary of said policy from the said defendant, Mable Claire Bower, his former wife, to the plaintiff herein, Virginia K. Bower, his wife, substituting the said plaintiff Virginia K. Bower in the place of said defendant Mable Claire Bower as the beneficiary of said policy of insurance, and that the plaintiff herein has been and now is the beneficiary thereunder.

IV.

That the said Joseph Edward Bower died and departed this life on or about the 29th day of September, 1955, leaving surviving him his said wife, plaintiff Virginia K. Bower, who made proof of the death of said insured on or about the 24th day of October, 1955, and has demanded payment to her of the proceeds of said policy of insurance, amounting to the sum of \$10,093.17.

V.

That the Western Life Insurance Company has paid into the registry of this Court the sum of \$10,093.17 to abide the judgment of this Court determining the right of the person entitled thereto.

VI.

That this plaintiff herewith tenders into Court the above-mentioned life insurance policy issued on the life of the said Joseph Edward Bower and in which plaintiff is named as the beneficiary as aforesaid.

VII.

That plaintiff denies that the defendant, Mable Claire Bower, also known as and called Mabel N. Bower, has any right, title, claim or interest in the proceeds of said insurance policy, now deposited in the registry of this Court, or any part thereof under a property settlement agreement as set forth in the complaint of Western Life Insurance Company on file herein, or otherwise or at all.

Wherefore, Plaintiff in interpleader prays judgment as follows:

1. That the Court adjudge that she is entitled to the payment to her of the sum of \$10,093.17, out of the proceeds of said life insurance policy, less the amount of attorney's fees and costs awarded by the Court to Western Life Insurance Company, a corporation.

2. That she be awarded her costs herein incurred and recover the same from defendant.

3. For such other and further relief as to the Court may seem equitable, proper and just.

/s/ H. GLEVELAND HALL,

/s/ EDWARD C. ALEXANDER,

Attorneys for Virginia K. Bower, Plaintiff in
Interpleader.

WESTERN LIFE

INSURANCE COMPANY



HELENA,

MONTANA

No. 89692

AGE: 33 * * *

Will Pay * * * amendment attached hereto * * * **TEN THOUSAND** * * * **Dollars,**
(WHICH IS THE FACE AMOUNT OF THIS POLICY)

To the Insured hereunder, if living, on the 27th day of September 1970, or

TO THE BENEFICIARY

Table Claire Bower, wife, if living at the time claim is made, otherwise to Joseph E. Bower III, George W. Bower, and Table Claire Bower, share and share alike, or the survivors or survivor thereof, sons and daughter of

THE INSURED

* * * Joseph Edward Bower * * *

Immediately upon receipt of due proof of the death of the insured while this Policy is in force. The face amount will be increased by any dividends left at interest and any dividend additions, and decreased by any existing indebtedness in any settlement of this Policy.

The consideration for this insurance is the application for this Policy, which is made a part hereof, and the payment in advance of the single premium of

* * * Four Thousand Six Hundred Eighty * * *

and 50 Dollars
100

The privileges, benefits and provisions printed and written on the following pages by the Company are made a part of this Contract, as fully as if they were recited at length over the signatures hereto affixed.

OPTIONS AT MATURITY OF POLICY

On the maturity date of this Policy and if no indebtedness to the Company on account of this Policy then exist, the Insured shall, at the end of thirty-two years from the date hereof, or within thirty-one days thereafter, have the choice of one of the following options, on surrender of this Policy:

- (1) Receive in cash, \$10,000.00 ,
- Or, (2) Receive a participating Policy of paid-up life insurance of \$10,000.00 ,
and cash, \$ 3,120.00 ,
- Or, (3) Receive a participating Policy of paid-up life insurance of \$14,530.00 ,
- Or, (4) Receive a Policy guaranteeing a life annuity, first payment
at the end of one year, of \$ 1,070.00 .

Options (2) and (3) shall be available only upon receipt of evidence of insurability satisfactory to the Company.

If no other option is selected as above provided, the Company will apply Option (1) to this policy.

EXECUTED at Helena, Montana, to take effect on the * * 27th * *
day of * * * September * * * 19 66 , which is the date
of issue of this Policy.

WESTERN LIFE INSURANCE COMPANY

(Company Seal)

ATTEST:

Arthur M. Bower
Arthur M. Bower Secretary

W. S. Fuhman
President



1
Policy Contains
the Contract

2
Policy Incontestable
for Two Years

3
Exception if Age is
correctly Stated

4
Amount Payable
Event of Suicide
Within Two Years

5
Solicitations
may be Made Only
by an Official

6
Policy May
be Assigned

7
Indebtedness

8
Benefits
Payable

9
Options of the
Insured

10
Optional Settlement
Provisions

11
Option
Proceeds May be Left
with Company at
Interest

12
Option
Designated Amounts
All Proceeds and
Interest are Exhausted

This Policy and the application therefor, copy of which is attached hereto, constitute the entire contract; and, in the absence of fraud, the statements made in the application shall be deemed representations and not warranties and no such statement shall avoid this Policy unless it be contained in the written application and a copy of such application be attached to or endorsed upon the Policy when issued.

This Policy shall be incontestable, after it has been in force, during the lifetime of the Insured, for two years from its date of issue. **This Policy is absolutely free from conditions or restrictions as to residence, occupation (including military or naval service in time of war or peace), travel or place of death, after date of issue, except as provided in the Permanent Total Disability and Accidental Death provisions, if any.**

If the age of the Insured is incorrectly stated, the amount payable under this Policy shall be the amount which the actual premium paid would have purchased at the true age of the Insured.

If the Insured shall commit suicide while sane or insane, within two years from date of issue, the liability of the Company shall be limited to the amount of the premium paid hereon and no more.

No agent has power on behalf of the Company to make or modify contracts, to waive any forfeiture, to bind the Company by any promise or representation, or to deliver any Policy contrary to the provisions thereof. These powers can be exercised only by the President, or a Vice-President, the Secretary, the Actuary, or an Assistant Secretary of the Company (and then only in writing), and will not be delegated.

This Policy may be assigned by the Insured, but no assignment shall be binding upon the Company unless made by an instrument in writing of which a duplicate shall be furnished to the Company, and receipt thereof acknowledged. The Company shall not be held responsible for the validity of any assignment, and any claim by an assignee shall be subject to proof of interest and extent thereof.

Upon any settlement under this Policy, all indebtedness to the Company on the Policy shall be a first lien in priority to the claim of any Beneficiary or Assignee and will be deducted in the payment of any benefit.

All benefits accruing under this Policy are payable at the Home Office of the Company, Helena, Montana.

This Policy is issued with the express understanding that the Insured may, without the consent of the Beneficiary, receive every benefit, exercise every right, and enjoy every privilege conferred by this Policy; and, without prejudice to any assignment, the Insured shall have full power to agree with the Company to any change in, amendment to, release or surrender of this Policy.

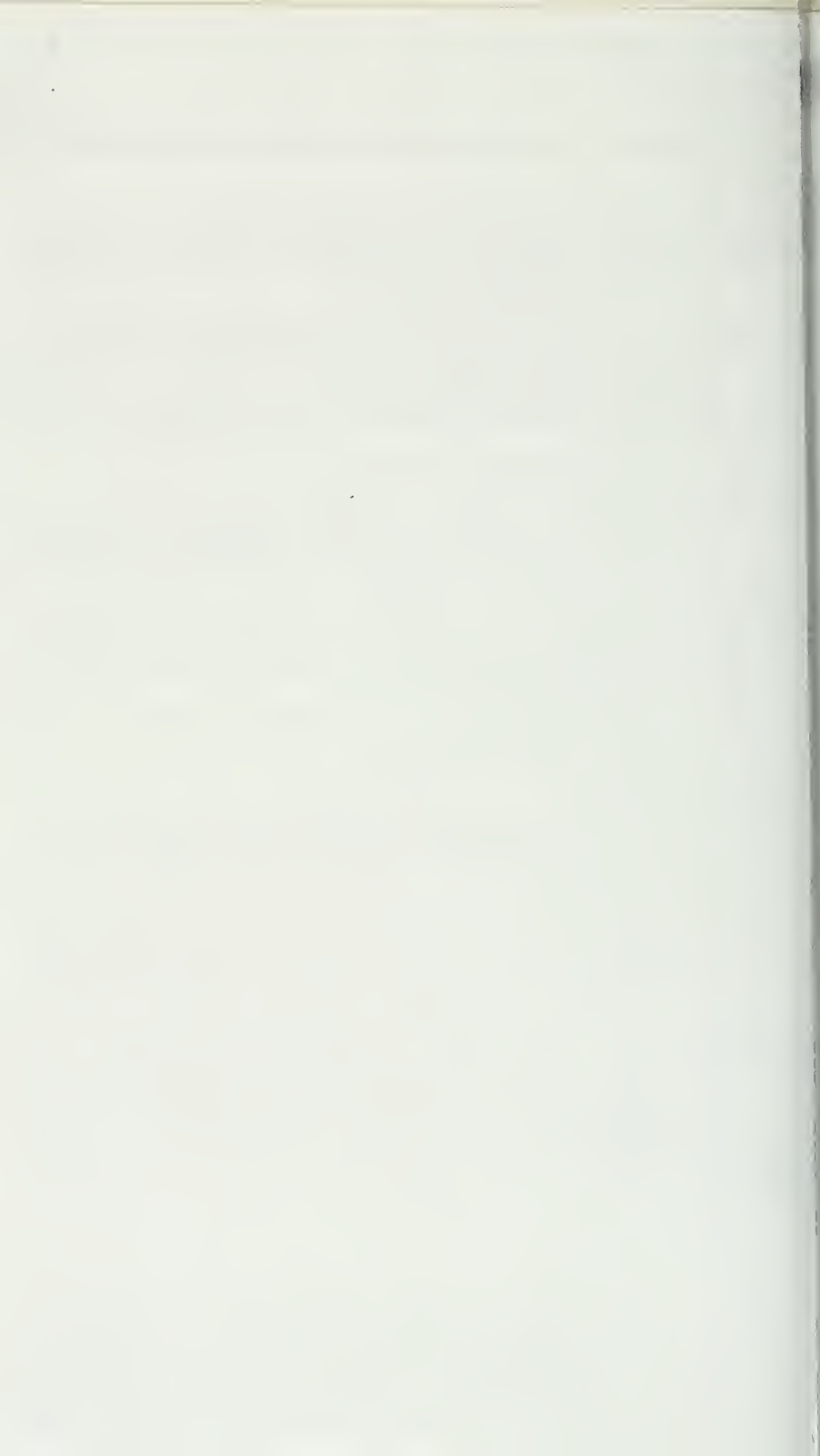
The Insured shall have the right to elect to have the net sum payable under this Policy, or any portion thereof, paid in accordance with the following options, and may subsequently change or revoke such election. If the Insured shall have made no such election and shall not have otherwise expressly directed, the Beneficiary, after the death of the Insured, shall have the right to elect any of the settlement options as hereinafter provided. At such time as one of these options may become effective, this Policy shall be surrendered to the Company in exchange for a Supplementary Contract providing for the manner of settlement elected.

The proceeds may be left with the Company for a specified period, the Company to pay interest thereon at the rate of 3½% per annum. At the end of the specified period the amount left on deposit will be paid either in one sum or under Option 2. Interest payments will be made annually, semi-annually, quarterly or monthly as may be requested. The first of such interest payments will be made at the end of the period selected, measured from date of approval of claim for settlement.

The proceeds may be left with the Company and payments of a designated amount made monthly, quarterly, semi-annually or annually, until the deposit shall be exhausted; the unpaid portion, while so retained, to be increased by interest thereon at the rate of 3½% per annum; or,

On the basis of each \$1,000 due, the proceeds may be paid in equal annual, semi-annual, quarterly or monthly installments over a period of from one to thirty years in accordance with the following table:

No. of Yrs. Payable	Annual Installments	Semi-Annual Installments	Quarterly Installments	Monthly Installments	No. of Yrs. Payable	Annual Installments	Semi-Annual Installments	Quarterly Installments	Monthly Installments	No. of Yrs. Payable	Annual Installments	Semi-Annual Installments	Quarterly Installments	Monthly Installments
1	\$1,000.00	\$504.34	\$253.24	\$84.65	11	\$107.34	\$54.14	\$27.18	\$9.09	21	\$65.74	\$33.16	\$16.65	\$5.58
2	508.61	256.61	128.80	43.10	12	99.98	50.42	25.32	8.46	22	63.70	32.13	16.13	5.39
3	344.88	173.93	87.33	29.15	13	93.78	47.30	23.75	7.94	23	61.85	31.18	15.66	5.23
4	253.05	128.87	64.81	22.27	14	88.47	44.62	22.40	7.46	24	60.17	30.35	15.24	5.08
5	213.99	107.92	54.19	18.11	15	83.89	42.31	21.24	7.10	25	58.82	29.56	14.84	4.96
6	181.32	91.45	45.72	15.35	16	79.89	40.29	20.23	6.76	26	57.20	28.85	14.49	4.84
7	158.01	79.89	40.01	13.38	17	76.37	38.52	19.34	6.46	27	55.90	28.19	14.16	4.73
8	140.58	70.89	35.60	11.90	18	73.25	36.94	18.55	6.20	28	54.69	27.58	13.85	4.63
9	127.00	64.05	32.18	10.75	19	70.47	35.54	17.85	5.97	29	53.57	27.02	13.57	4.53
10	118.18	58.59	29.42	9.83	20	67.98	34.28	17.22	5.75	30	52.53	26.49	13.30	4.45



Third Option.
Installments for a
United Number of
Years Certain and Con-
tinuous During Life-
time of Payee

On the basis of each \$1,000 due, the proceeds may be paid in equal annual, semi-annual, quarterly or monthly installments over a period of ten, fifteen or twenty years certain, and continuously thereafter throughout the lifetime of the Payee. The amount of each installment will depend upon the attained age and sex of the Payee at the time the first installment is due, and will be determined in accordance with the following table:

Age of Payee When First Installment is Payable	10 Years Certain		15 Years Certain		20 Years Certain		Age of Payee When First Installment is Payable	10 Years Certain		15 Years Certain		20 Years Certain	
	Annual Install.	Monthly Install.	Annual Install.	Monthly Install.	Annual Install.	Monthly Install.		Annual Install.	Monthly Install.	Annual Install.	Monthly Install.	Annual Install.	Monthly Install.
Male Female							Male Female						
20 24	\$44.45	\$3.78	\$44.14	\$3.75	\$43.45	\$3.72	48 52	\$61.87	\$5.28	\$59.71	\$5.10	\$56.95	\$4.85
21 25	44.78	3.81	44.45	3.78	44.03	3.74	49 53	62.95	5.39	60.58	5.17	57.58	4.80
22 26	45.12	3.84	44.78	3.81	44.33	3.77	50 54	64.09	5.48	61.49	5.25	58.22	4.86
23 27	45.48	3.87	45.12	3.84	44.85	3.79	51 55	65.28	5.58	62.40	5.33	58.86	5.01
24 28	45.85	3.90	45.48	3.87	44.98	3.82	52 56	66.48	5.69	63.41	5.41	59.49	5.06
25 29	46.24	3.93	45.85	3.90	45.30	3.85	53 57	67.75	5.80	64.30	5.49	60.11	5.12
26 30	46.65	3.97	46.24	3.93	45.68	3.88	54 58	69.05	5.92	65.27	5.57	60.73	5.17
27 31	47.07	4.01	46.65	3.97	46.05	3.92	55 59	70.43	6.03	66.25	5.65	61.34	5.22
28 32	47.52	4.04	47.07	4.00	46.42	3.95	56 60	71.83	6.16	67.24	5.74	61.93	5.27
29 33	47.98	4.08	47.52	4.04	46.80	3.98	57 61	73.30	6.28	68.24	5.83	62.50	5.32
30 34	48.46	4.13	47.98	4.08	47.24	4.02	58 62	74.80	6.41	69.23	5.91	63.05	5.36
31 35	48.97	4.17	48.41	4.12	47.66	4.05	59 63	76.35	6.55	70.23	5.99	63.58	5.40
32 36	49.49	4.22	48.97	4.16	48.10	4.09	60 64	77.94	6.69	71.22	6.08	64.08	5.44
33 37	50.04	4.26	49.49	4.22	48.55	4.13	61 65	79.58	6.83	72.20	6.18	64.55	5.48
34 38	50.61	4.31	50.04	4.25	49.02	4.17	62 66	81.25	6.97	73.17	6.24	64.99	5.52
35 39	51.22	4.37	50.61	4.30	49.50	4.21	63 67	82.95	7.12	74.12	6.32	65.40	5.55
36 40	51.81	4.42	51.05	4.35	50.00	4.26	64 68	84.68	7.27	75.03	6.40	65.78	5.58
37 41	52.49	4.46	51.65	4.40	50.51	4.30	65 69	86.44	7.42	75.91	6.47	66.12	5.61
38 42	53.18	4.54	52.26	4.45	51.03	4.34	66 70	88.22	7.57	76.77	6.54	66.43	5.64
39 43	53.89	4.60	52.90	4.51	51.57	4.39	67 71	90.01	7.72	77.58	6.61	66.70	5.65
40 44	54.63	4.66	53.56	4.57	52.12	4.44	68 72	91.80	7.87	78.35	6.67	66.84	5.68
41 45	55.41	4.73	54.24	4.62	52.69	4.49	69 73	93.65	8.05	79.06	6.72	67.14	5.69
42 46	56.22	4.80	54.95	4.69	53.27	4.54	70 74	95.55	8.17	79.73	6.79	67.32	5.70
43 47	57.07	4.87	55.66	4.75	53.86	4.59	71 75	97.12	8.32	80.34	6.89	67.47	5.71
44 48	57.95	4.95	56.44	4.81	54.46	4.64	72 76	98.80	8.48	80.99	6.97	67.60	5.72
45 49	58.87	5.03	57.22	4.88	55.07	4.69	73 77	100.47	8.60	81.39	6.91	67.69	5.73
46 50	59.83	5.11	58.03	4.95	55.89	4.74	74 78	102.08	8.73	81.83	6.95	67.77	5.74
47 51	60.83	5.20	58.85	5.02	56.32	4.80							

To determine the semi-annual or quarterly installments under this option, multiply the annual installment by .504 to obtain semi-annual and by .253 to obtain quarterly.

Fourth Option.
Joint and Survivorship
Annuity

The proceeds may be paid in installments jointly to two Payees during their lifetime and upon the death of either, installments shall be paid to the survivor for life. The amount of each installment will depend upon the attained ages and sexes of the Payees at the time the first installment is due, and will be computed on the basis of the American Annuity Table Male Select and Ultimate Table of Mortality with interest at the rate of 3½% per annum, such Table of Mortality to be applied, as to any female Payee, at an age four years younger than the true age of such female.

First Payment

The first installment under either Option 2, 3 or 4 shall be made immediately upon approval of claim for settlement and subsequent installment payments made periodically in accordance with manner of payment elected. Should the Payee under this Policy die before receiving all installments payable under Options 2 or 3 or the face amount under Option 1, any part of the proceeds still remaining with the Company under either the First or Second Option, or the then present value of the unpaid installments certain under the Third Option, commuted at 3½ per centum per annum, compound interest, shall be paid in one sum to the executors or administrators of the Payee, unless other provision shall have been previously made and approved by the Company.

Beneficiary Can Not
Commute Payments

If the election of any of the above options has been made by the Insured, the Payee shall not have the right to assign, alienate or commute any of the payments thereunder or change the manner of settlement in any way, unless such right is given to the Payee by the Insured in writing, and is endorsed on the Policy by the Company.

Reserve Interest

Each installment payment certain after the first, under the Third Option, each Installment Payment under the Second Option, and each interest payment under the First Option will be increased by such share of interest in excess of 3½ per centum per annum as may be apportioned thereto by the Board of Directors of the Company. Any proceeds of this Policy held by the Company shall be mingled with the general assets of the Company.

11
Beneficiary May
Be Declared
Irrevocable

The Insured may declare the designation of any Beneficiary to be irrevocable; in which event the Insured shall not have the right to change the Beneficiary during the lifetime of such irrevocably designated Beneficiary. If any Beneficiary die before the Insured, the interest of such Beneficiary shall vest in the Insured, except as may be herein otherwise expressly provided.

12
Basis of Computation
and Valuation
Required by State
Laws

The reserve on this Policy shall be computed on the basis of the American Experience Table of Mortality, and three and one-half per cent interest.

13
How Beneficiary
May Be Changed

The Guaranteed Cash Values are equivalent to the full reserve on this Policy less a surrender charge in no case of more than two and one-half per centum of the face amount of this Policy.

14
Guaranteed
Cash Values

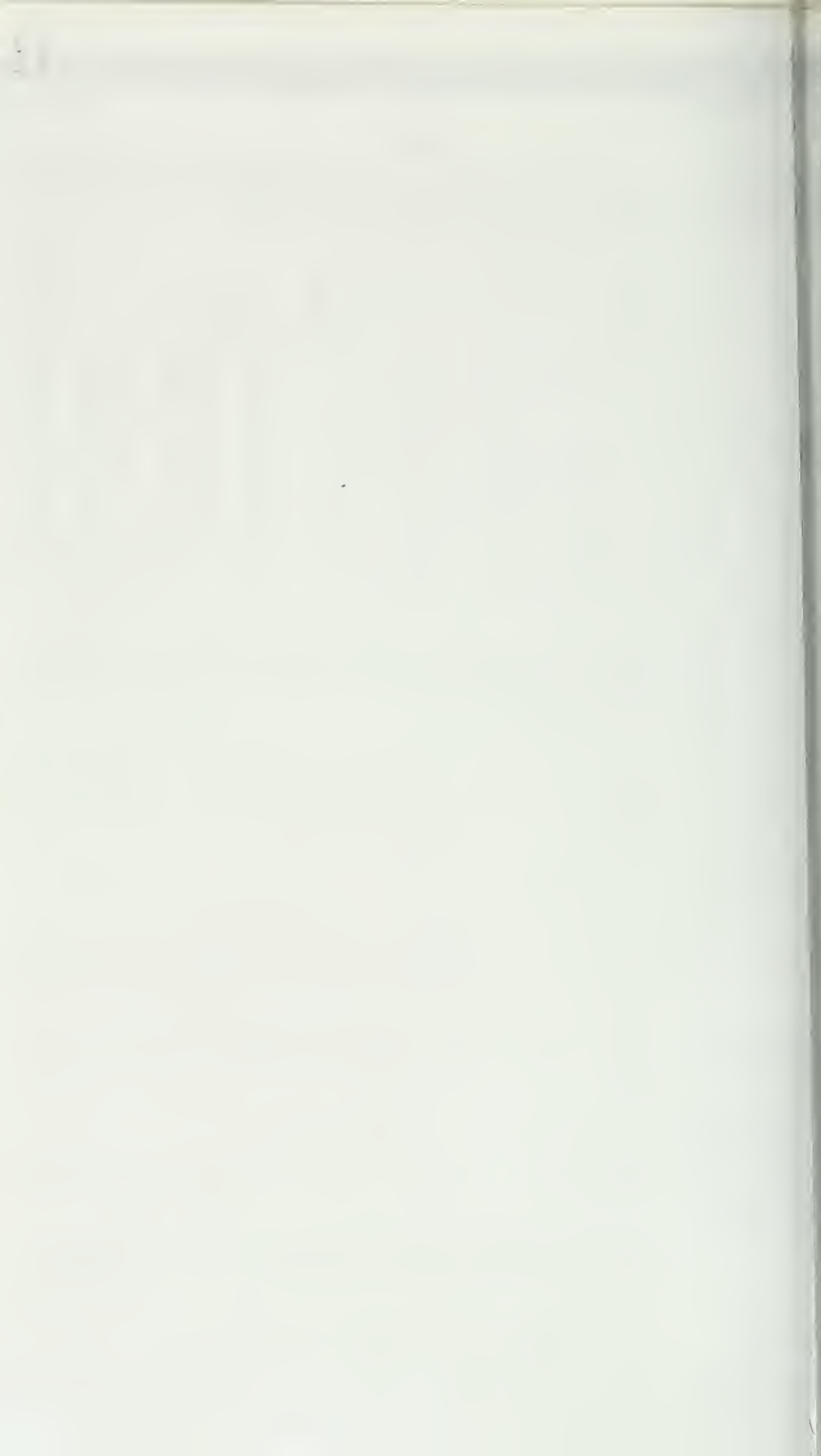
The Insured may at any time, and from time to time, provided this Policy be then in force, and subject to the rights of any Assignee, change the Beneficiary or Beneficiaries by sending to the Company at the Home Office, a written notice in due form accompanied by this Policy. Such change will take effect only when endorsed on this Policy by the Company and shall then relate back to and take effect as of the date the Insured signed said written notice whether the Insured be living at the time of said endorsement or not, but without prejudice to the Company on account of any payment made by it before such endorsement.

15
Effect of Indebted-
ness on Guaranteed
Cash Values

The Insured may, upon written request, and within thirty-one days after any anniversary of this Policy, surrender this Policy to the Company and receive the then current cash value of this Policy in accordance with the "Table of Guaranteed Values" herein.

If there be any indebtedness against this Policy the Cash Value shall be reduced by that amount.

Values for all years after twenty will be furnished upon request and will be equal or equivalent to the entire Life Insurance Reserve on the Policy.



16
 Loans
 Made

At any time while this Policy is in force, the Company will loan upon proper assignment of this Policy, and upon the sole security thereof, all or any part of the sum stated in the Table of Guaranteed Values herein, subject to the deduction of all existing indebtedness to the Company on the Policy. This loan shall bear interest at the rate of six per centum per annum, payable in advance to the end of the current policy year and annually thereafter, and this interest, if not so paid, shall be added to the existing loan and shall bear interest at the same rate. Failure to repay any such loan, or to pay the interest thereon, shall not cancel this Policy until the total indebtedness to the Company shall equal or exceed the loan value nor until thirty-one days after notice has been mailed by the Company to the last known address of the Insured and of the Assignee, if any. The Company shall have the right to defer making any loan for a period of not exceeding ninety days.

17
 Loans May
 Insured

Any loan under this Policy may be covered by term insurance as follows: The Insured must furnish evidence of insurability satisfactory to the Company. The premium shall be computed at the age of the Insured at nearest birthday at the time such insurance is granted or renewed, in accordance with the rates in the table below. For periods of less than one year, the premium shall be at the rate of one-tenth of the annual premium for each month or fraction of a month. Insurance to cover a loan shall not extend beyond the next policy anniversary, but may under the same conditions be renewed from year to year. No such insurance shall be made or renewed after the age of 65, nearest birthday. Any such insurance in excess of the total loan indebtedness shall be void and the Company will refund any unearned premium. Insurance to cover a loan shall take effect upon delivery to the Insured of the Company's Certificate. Upon the due proof of the death of the Insured, the sum payable shall be applied to the cancellation of the indebtedness.

ANNUAL PREMIUMS FOR EACH \$100 OF LOAN INSURANCE

When Age is.....	21	22	23	24	25	26	27	28	29	30	31	32	33	34	35	36	37	38	39	40	41	42
The Prem. will be.....	\$.76	.76	.77	.77	.78	.79	.79	.80	.81	.81	.82	.83	.84	.85	.86	.86	.89	.91	.93	.95	.97	.99
When Age is.....	43	44	45	46	47	48	49	50	51	52	53	54	55	56	57	58	59	60	61	62	63	64
The Prem. will be.....	\$1.02	1.05	1.08	1.12	1.16	1.21	1.27	1.33	1.41	1.49	1.58	1.68	1.79	1.92	2.06	2.22	2.39	2.58	2.79	2.02	9.28	9.56

Table of Guaranteed
 Values For \$1,000 of
 the Face Amount

END OF POLICY YEAR	LOAN OR CASH
	DOLLARS
1	403
2	418
3	433
4	449
5	465
6	481
7	498
8	506
9	519
10	532
11	546
12	560
13	575
14	590
15	606
16	623
17	640
18	658
19	676
20	695

The Values shown in this
 table are for \$1,000 of insur-
 ance. Should this Policy be
 for more or less than \$1,000,
 its Loan or Cash Values
 will be for correspondingly
 greater or less amounts.



Dividend Provisions

Annual Dividends

At the end of the first and each subsequent policy year, this Policy, while in full force as a paid-up Policy will be credited with such dividends as are declared thereon by the Board of Directors of the Company.

How Dividends May Be Used

The Insured may use these dividends as they become payable in any one of the following three ways:

- (1) Receive them in cash; or
- (2) Use them to buy a participating paid-up addition to the Policy payable at the same time and under the same conditions as the original Policy. Such paid-up additions shall not require evidence of insurability and may be exchanged at any time for a cash value equal to the entire reserve thereon; or
- (3) Leave them with the Company to accumulate at interest, compounded and credited annually, at such rate as the Board of Directors shall declare, but not less in any event, than three and one-half per centum (3½%) per annum. Such dividend and interest may be withdrawn at any time in cash, or, upon satisfactory evidence of insurability may be used to buy a participating paid-up addition to the Policy. If not withdrawn in cash, or so applied, any such dividends and interest will be paid in cash upon maturity of the Policy.

Unless the Insured shall use them otherwise within 30 days after the end of any policy year, such dividend shall be used to buy paid-up additions, as set forth in (2) above.

Dividend After Death

If this Policy becomes a claim by death after the first policy year, a cash dividend will be credited to the Policy for that part of the policy year which has elapsed before such death.

Dividends May be Used to Buy Paid-up Additions to the Policy

Whenever the cash value on the face amount of this Policy and on any dividend additions, together with any dividends left at interest, and interest thereon, shall equal the face amount of this Policy the Company will pay this amount to the Insured in cash upon surrender of the Policy at the Home Office. Should the Insured at any time wish to take advantage of this option, the Company, upon written request, will advise him as to the condition of the Policy.

If the total value of this Policy, including dividend values, is more than sufficient to mature it as an endowment, the excess value will be paid to the Insured in cash.

Effect of Dividends on Guaranteed Values

The figures in the Table of Guaranteed Values, on page 4, are the values available if the Policy is without dividend additions or indebtedness. The reserve on any paid-up dividend additions shall be added to the loan or cash value. Any dividends which have been left to accumulate at interest will increase the available loan or cash value.



SETTLEMENT OPTION NO. 2

Attached to and forming a part of Policy No. 89692

At the request of Joseph Edward Bower * * * , the insured under this policy,

The Western Life Insurance Company agrees as follows:

Should the death of the insured occur while this policy is in force the Company will pay to the beneficiary \$2,000.00 in one sum on receipt of due proof of death and will retain the balance of the proceeds (the proceeds less the lump sum payment and any existing loan) and in lieu thereof will pay to the beneficiary of record an income of \$95.20 payable monthly for a period of eight years.

The first payment will be made on the day claim is approved. Future payments will be made in accordance with the preceding paragraph, for the time specified in the table under this option, or until the proceeds are exhausted.

If because of indebtedness the face amount of this policy is not available at the date of death the income payments detailed above will be reduced proportionately. If an odd amount remains over the present value of the equal payments designated above, such odd amount will be adjusted on the first income payment.

During the period that funds are held with the Company under this settlement option, interest thereon at the rate of not less than three and one-half per centum per annum will be paid the beneficiary of record.

The right to modify or rescind this settlement option is reserved to the insured during his lifetime.

During the period that any funds remain on deposit with the Company under this settlement option, such funds shall be mingled with the general assets of the Company.

No commutation of this settlement option will be made during the life time of the original beneficiary following the death of the insured, unless written authorization by the insured giving the beneficiary this privilege is on file with the Company.

At the death of the insured the return of this policy will be demanded and upon its receipt the Company will issue in lieu thereof, a certificate to the beneficiary which will conform to this settlement option.

The above option will be disregarded if any portion of the proceeds becomes payable to the estate of the insured or the estate of a beneficiary.

Audited by *W.L.*

Endorsed: Filed June 20, 1956.



[Title of District Court and Cause.]

ANSWER AND CROSS COMPLAINT

Comes now, Mable Claire Bower, also known and called Mabel N. Bower the defendant in interpleader in the above-entitled action, answering the complaint in interpleader of Virginia K. Bower and admits, denies and alleges as follows:

I.

Admits the allegations contained in Paragraph I.

II.

Admits the allegations contained in Paragraph II.

III.

Answering Paragraph III, admits that the marital relationship existing between Mable Claire Bower and Joseph E. Bower was terminated and dissolved by decree of divorce duly made and entered in the district court of the eighth judicial district of the State of Montana in and for the county of Cascade, on the 24th day of October, 1946, and on this connection alleges that thereafter the said Joseph E. Bower wrongfully changed the beneficiary of said policy from his former wife Mable Claire Bower to his then wife, the plaintiff in interpleader, Virginia K. Bower.

IV.

Answering Paragraph IV, admits that the said Joseph E. Bower died on or about the 29th day of September, 1955, leaving surviving him his then wife, plaintiff Virginia K. Bower.

V.

Admits the allegations contained in Paragraph V.

VI.

Admits the allegations contained in Paragraph VI.

VII.

Specifically denies the allegations contained in paragraph VII.

Comes now, the defendant in interpleader Mable Claire Bower also known as and called Mabel N. Bower by way of cross complaint and complains and alleges as follows:

I.

Plaintiff at all times herein mentioned has been and now is a resident and citizen of the State of Montana. Defendant is a resident and citizen of the State of Texas. The amount involved in this action is in excess of Three Thousand and no/100 (\$3,000.00) Dollars excluding interest and costs.

II.

That heretofore, on or about the 26th day of September, 1938, the Western Life Insurance Company, a corporation, in consideration of the payment to it by Joseph Edward Bower of the sum of \$4,680.50, issued and delivered to said Joseph Edward Bower its single premium endowment policy No. 89692 in the sum of \$10,000.00, naming and designating the defendant, Mable Claire Bower, then the wife of said insured, as the beneficiary thereof, payable to

said insured, if living, on the 27th day of September, 1970, and in the event of his death prior thereto to said defendant, Mable Claire Bower, his then wife, and the beneficiary named in said policy.

III.

That thereafter and on the 15th day of August, 1946, the said Mabel N. Bower and Joseph E. Bower for valuable consideration, entered into a written property settlement agreement wherein it was mutually agreed in Paragraph VII thereof that in the event that the said Joseph E. Bower should die before the said Mabel N. Bower, all the benefits and payments under said policy shall inure to and belong to and be paid to the said Mabel N. Bower. That thereafter and on the 24th day of October, 1946, the marital relationship existing between the said Mable N. Bower and Joseph E. Bower was terminated and dissolved by a judgment and decree of divorce made and entered in the above-entitled Court. That a true and correct copy of said written divorce property settlement agreement is attached hereto marked Exhibit "A" and by this reference made a part hereof.

Wherefore, defendant in interpleader prays judgment as follows:

1. That after hearing duly had herein, this Court do make and enter its judgment decreeing that the said defendant in interpleader is the owner of and entitled to the payment to her of the sum of \$10,093.17 from the proceeds of said life insurance policy less attorneys fees and costs awarded by this Court to

the Western Life Insurance Company, a corporation.

2. Judgment against the plaintiff in interpleader, Virginia K. Bower for her costs of suit herein expended.

3. For such other and further relief as to the Court may seem just and equitable in the premises.

/s/ WILLIAM A. BROWN,
Attorney for Defendant in
Interpleader.

EXHIBIT "A"

Agreement

This Agreement made and entered into this 15th day of August, A.D. 1946, by and between Mabel N. Bower, Party of the First Part and Joseph E. Bower, Party of the Second Part, both of Great Falls, Cascade County, Montana.

Witnesseth:

Whereas, the parties to this agreement are husband and wife and certain differences have arisen between them to such an extent that one or the other of the parties hereto is about to file divorce proceedings against the other party, and

Whereas, the parties hereto desire to settle and adjust amicably certain matters arising out of any

divorce proceedings that may be instituted by either party hereto against the other, with reference to the care, custody and control of their minor children, support money for the same, alimony, property settlement and costs and fees of any such proceedings for divorce instituted by either party hereto, against the other.

Now, Therefore, It Is Hereby Mutually Agreed and Understood, as Follows, to wit:

I.

That the said minor children, namely, Joseph Edward Bower, Jr., aged seventeen; George Norris Bower, aged sixteen, and Mabel Claire Bower, aged twelve, shall, each for themselves, determine with which of the parties hereto they desire to live, and such decision on the part of each child shall be respected by the parties hereto and the parties hereto shall not interfere with or influence or attempt to influence such child's decision or endeavor to persuade such child to change or alter his or her decision; that the future education of the said minor children has already been provided for by their grandmother; that the second party agrees to provide any reasonable support for said children, also emergency expense required by any of them at any time, such as sickness, accident or any other misfortune or incident which might jeopardize and endanger their lives, health or welfare; that the first party shall have the right and privilege, at any time,

to contribute any amount of money, gifts or assistance of any kind to the support, education, happiness and welfare of each of said children; that either party hereto shall have the right to visit any one of said children while in the care and custody of the other party hereto, at any reasonable time of the day at reasonable intervals and for reasonable periods of time, and also to have the right to have the child or children visit them for such times and periods.

II.

That in the event First Party institutes said divorce proceedings against second party, it is to be understood that second party will pay such reasonable costs and attorneys' fees for her up to and including Three Hundred and No/100ths Dollars (\$300.00).

III.

That the first party, in lieu of any alimony for her support or any property settlement that the Court may decree and determine in her favor against the second party, herewith covenants and agrees to accept in full settlement of all and any claim she has or may have against the second party for such alimony or property settlement, the property settlement set forth in the following paragraphs, to wit:

IV.

That for the purpose of a property settlement, it is understood that the property owned by the parties hereto is approximately as follows:

Ranch in Lewis & Clark County, near Lincoln, Montana, heretofore operated as a Dude Ranch, together with the furniture, fixtures, equipment, cooking utensils, dishes, cutlery, etc., now located at and used in connection with the use and occupation of said property, estimated at a value of.....\$25,000.00

Residence in Great Falls, Montana, together with the furniture, fixtures, equipment, cooking utensils, dishes cutlery, etc., now located at and used in connection with the use and occupation of said property, estimated at value of. 12,000.00

Cash, estimated at..... 16,000.00

U. S. War Savings Bonds, invested..... 3,750.00

Kelvinator Corp. Stock and Union Bank of Helena (or Northwest Bank Stock) estimated at a value of..... 3,000.00

Total Estimated Value.....\$60,000.00

V.

That in order to divide said property as equally as possible, it is agreed that the Party of the First Part is to receive the following:

Great Falls Dwelling, together with said furniture, fixtures, equipment, etc., as above set forth.....\$12,000.00

U. S. War Bonds (plus accrued interest). 3,750.00

Kelvinator Co. and Union Bank stock plus dividends, if any.....	3,000.00
Cash, being the balance left after Second Party has been paid \$5,000.00 estimated at	11,000.00
Estimated Total	\$30,000.00

And the Party of the Second Part is to receive the following:

Lewis and Clark County Ranch, together with said furniture, fixtures, equipment, etc., as above set forth.....	\$25,000.00
Cash	5,000.00
Estimated Total	\$30,000.00

It Is Understood and Agreed, however, that each of the parties hereto shall be entitled to their personal clothing, effects, and any gifts given to them whether for wedding, birthdays or otherwise, and no matter where the same may be located.

VI.

It is further agreed by the Party of the Second Part, that in the event he should sell said ranch for more than \$25,000.00, he will, if the value of the property received by the First Party in this settlement does not equal the value of the property received by the Party of the Second Part in this settlement, give the Party of the First Part one-half ($\frac{1}{2}$) of the cash he receives for the ranch over and

above \$25,000.00, after costs of sale and transfer have been deducted from said amount over \$25,000.00.

VII.

That it is understood and agreed that the Party of the Second Part has heretofore obtained a life or endowment insurance policy from the Western Life Insurance Company for \$10,000.00, in which the Party of the Second Part named the First Party beneficiary and that if and when any payments are made thereon by said insurance company, during both of the lives of the parties hereto, that the same shall be divided equally between the parties hereto; that in the event that the Second Party shall die first, all the benefits and payments under said policy shall inure to and belong to the Party of the First Part and be paid to her; in the event the Party of the First Part should die first, all such benefits and payments shall inure to and be payable to the Party of the Second Part.

VIII.

That the transfers of all said property to the party entitled thereto, as herein provided, shall be consummated immediately after either one of the parties hereto has obtained a Decree of Divorce from the other party hereto.

IX.

That in the event said property settlement is consummated, as aforesaid, each of the parties hereto herewith agree that they will not assert any claim against the other, whether in law or equity, by way of support money, alimony, property settlement, or

otherwise, and they each do, for themselves, hereby waive any claim of any kind that either of them may have against the other, including dower interests or against the property or estate of either, now owned or hereafter acquired by either one of them; they further agree that each of them will sign, execute and deliver any and all instruments to effectuate the intent of this agreement.

In Witness Whereof the Parties hereto have hereunto set their hands and seals the day and year first above mentioned.

/s/ MABEL N. BOWER,
Party of the First Part.

/s/ J. E. BOWER,
Party of the Second Part.

State of Montana,
County of Cascade—ss.

On this 15th day of August, A.D. 1946, before me, O. B. Kotz, a Notary Public, personally appeared Mabel N. Bower and Joseph E. Bower, known to me to be the persons whose names are subscribed to the within Agreement and acknowledged to me that they executed the same.

[Seal] /s/ O. B. KOTZ,
Notary Public for the State of Montana, Residing
at Great Falls, Montana.

My Commission Expires April 1, 1948.

[Endorsed]: Filed July 17, 1956.

[Title of District Court and Cause.]

PLAINTIFF'S MOTION FOR
SUMMARY JUDGMENT

Comes Now the above-named plaintiff in interpleader, Virginia K. Bower, and moves that the Court make, give and enter a Summary Judgment in her favor in the above-entitled cause on the following grounds:

1. The case has been submitted to the Court for decision upon an agreed statement of facts entered into between the respective parties, Virginia K. Bower and Mable Claire Bower, also known as and called Mabel N. Bower.

2. That there is no genuine issue as to any material part in said cause as between the above-named parties.

3. That the said Virginia K. Bower, plaintiff in interpleader, is entitled to judgment in her favor as a matter of law.

Dated this 14th day of November, 1956.

/s/ H. CLEVELAND HALL,

/s/ EDW. C. ALEXANDER,

Attorneys for the Plaintiff in Interpleader, Virginia K. Bower.

[Endorsed]: Filed November 14, 1956.

[Title of District Court and Cause.]

MOTION FOR SUMMARY JUDGMENT

Comes Now Mable Claire Bower, also known as Mabel N. Bower, the Defendant in Interpleader named above, and respectfully moves the court as follows:

I.

There are no issues of fact between the parties to this action and the Plaintiff, and Defendant in Interpleader have submitted the action to this court upon an agreed statement of fact for its decision as expeditiously as possible.

II.

That by reason of the pleadings filed herein and the agreed statement of facts between the Plaintiff in Interpleader and the Defendant in Interpleader, the said Mable Claire Bower, also known and called Mabel N. Bower, is entitled to a summary judgment awarding her the sum of Ten Thousand Ninety-Three Dollars and Seventeen Cents (\$10,093.17) as prayed for in her answer and cross-complaint and for her costs of suit herein expended.

Dated this 15th day of November, 1956.

/s/ WILLIAM A. BROWN,

Attorney for Defendant in Interpleader Mable
Claire Bower, Also Known as Mabel N. Bower.

[Endorsed]: Filed November 16, 1956.

[Title of District Court and Cause.]

ORDER

This cause is submitted by the plaintiff in interpleader (hereafter referred to as plaintiff) and the defendant in interpleader (hereafter referred to as defendant) upon an agreed statement of facts. The controversy involves the proceeds of an insurance policy issued upon the life of Joseph Edward Bower by Western Life Insurance Company, which has deposited in the registry of the court the proceeds of the policy amounting to \$10,093.17.

The policy was a single premium endowment policy, issued September 27, 1938, payable to the insured, if living, on September 27, 1970, and, in the event of his death prior thereto, to defendant, who was then the wife of the insured and the beneficiary named in the policy.

The policy contained the following provisions:

“9. This policy is issued with the express understanding that the insured may, without the consent of the beneficiary, receive every benefit, exercise every right, and enjoy every privilege conferred by this policy; and, without prejudice to any assignment, the insured shall have full power to agree with the Company to any change in, amendment to, release or surrender of this policy.”

“13. The insured may at any time, and from time to time, provided this policy be then in force, and subject to the rights of any assignee, change the

beneficiary or beneficiaries by sending to the Company at the Home Office, a written notice in due form accompanied by this policy. Such change will take effect only when endorsed on this policy by the Company and shall then relate back to and take effect as of the date the insured signed said written notice, whether the insured be living at the time of said endorsement or not, but without prejudice to the Company on account of any payment made by it before such endorsement."

On August 15, 1946, Joseph Edward Bower, the insured, and the defendant, entered into a property settlement agreement which provided in part as follows:

"Whereas, the parties to this agreement are husband and wife and certain differences have arisen between them to such an extent that one or the other of the parties hereto is about to file divorce proceedings against the other party, and

"Whereas, the parties hereto desire to settle and adjust amicably certain matters arising out of any divorce proceedings that may be instituted by either party hereto against the other, with reference to the care, custody and control of their minor children, support money for the same, alimony, property settlement and costs and fees of any such proceedings for divorce instituted by either party hereto, against the other" * * *

"III. That the first party, in lieu of any alimony for her support or any property settlement that the

court may decree and determine in her favor against the second party, herewith covenants and agrees to accept in full settlement of all and any claims she has or may have against the second party for such alimony or property settlement, the property settlement set forth in the following paragraphs, to wit:”

There follows provisions for the disposition of all of the property owned by the parties to the agreement, including as paragraph VII, the following:

“That it is understood and agreed that the party of the second part has heretofore obtained a life or endowment insurance policy from the Western Life Insurance Company for \$10,000.00, in which the party of the second part named the first party beneficiary and that if and when any payments are made thereon by said insurance company, during both of the lives of the parties hereto, that the same shall be divided equally between the parties hereto; that in the event that the second party shall die first, all the benefits and payments under said policy shall inure to and belong to the party of the first part and be paid to her; in the event the party of the first part should die first, all such benefits and payments shall inure to and be payable to the party of the second part.”

Paragraph VIII reads as follows:

“That the transfers of all said property to the party entitled thereto, as herein provided, shall be consummated immediately after either one of the

parties hereto has obtained a Decree of Divorce from the other party hereto.”

At the same time, and as a part of the same transaction, Joseph Edward Bower and the defendant entered into a supplemental agreement, as follows:

“Supplemental Agreement

“This Supplemental Agreement, made and entered into this 15th day of August, A.D. 1946, by and between Mabel N. Bower, Party of the First Part, and Joseph E. Bower, Party of the Second Part, both of Great Falls, Cascade County, Montana.

“Witnesseth:

“Whereas, the parties to this supplemental agreement, being husband and wife, have heretofore, on the same date, entered into an Agreement with reference to property settlement, the care, custody and control of their minor children, support money for the same and costs and fees of any divorce proceedings instituted by either party hereto against the other, and in consideration thereof,

“It Is Hereby Specifically Understood and Agreed that unless the First Party institutes a divorce proceedings against the Second Party on or before the 1st day of October, 1946, then, in that event, the Second Party shall have the right to institute such divorce proceedings against the First Party.

“It Is Further Understood and Agreed that in the event that either party resists the divorce proceedings instituted against them by the other party, that, then in that event, said property agreement shall be cancelled and considered null and void and not be used by either party in any such divorce proceedings.

“It Is Further Agreed and Understood that the Judge of any Court which may hear such divorce proceedings is hereby authorized, if the Court deems it warranted, to include in any decree of divorce any part or portion of said property settlement agreement.

“(Duly signed and acknowledged.)”

Pursuant to these agreements, the defendant on September 26, 1946, instituted an action for divorce against Joseph Edward Bower. Default decree was entered October 24, 1946, in favor of the defendant herein.

On August 15, 1946, Joseph Edward Bower was in the exclusive possession of the policy of insurance and remained in possession thereof until his death on September 29, 1955. Subsequent to October 24, 1946, Joseph Edward Bower married the plaintiff herein, and on December 7, 1949, in the exercise of his reserved right to change the beneficiary named in the insurance policy, changed the beneficiary from the defendant herein to the plaintiff herein. Plaintiff at all times since then has been, and now is, the named beneficiary. Plaintiff claims the pro-

ceeds of the insurance policy as the beneficiary named in the policy at the time of the insured's death. Defendant claims the proceeds under the agreements between insured and defendant, dated August 15, 1946.

The plaintiff herein, Virginia Bower, as the named beneficiary at the time of the insured's death, is entitled to the proceeds of the policy unless the defendant herein, Mabel Claire Bower, had a vested interest in the policy which could not be divested by a change of beneficiary under the reserved power. It is the position of the defendant that she acquired a vested interest in the policy under the property settlement agreement. Plaintiff contends that the property settlement agreement is against public policy and accordingly void and unenforceable.

It is the general rule that where a right to change the beneficiary has been reserved by the insured, the beneficiary named in the policy has a mere expectancy and no vested right or interest therein during the life of the insured. *Morgan vs. Penn Mut. Life Ins. Co.*, 1938, 8 Cir., 94 F. 2d 129; *Doering v. Buechler*, 1945, 8 Cir., 146 F. 2d 784; 46 C.J.S., Insurance, Sec. 1173 b(2), p. 62. This rule is subject, however, to well recognized exceptions, and a reserved right to change the beneficiary named in the policy may not be exercised where insured has divested himself of the right by agreement. This exception is stated by *Corpus Juris Secundum* as follows: "However, the reserved right to change the beneficiary may not be exercised where * * * insured

has waived or divested himself of the right, as by agreeing to keep the policy in force for the beneficiary or by making a completed gift of the policy to the beneficiary, or where there are facts establishing an equitable interest in the beneficiary. Where sound equities exist in favor of the beneficiary, such rights will be protected against the substitution of a second beneficiary who is a volunteer or who has no superior equities in his favor." 46 C.J.S., Insurance, Sec. 1175 c (1), p. 71. See also 2 Appleman, Insurance Law and Practice, Sec. 922; 175 A.L.R. 1220.

Property settlements may create a vested equitable interest. This rule is stated in Appleman's Treatise on Insurance Law, Vol. 2, Sec. 922, p. 338, as follows:

"An antenuptial agreement is a satisfactory consideration for the acquisition of a vested interest in a policy designation. A settlement of property rights arising from a contemplated divorce may have the same result, as may a separate maintenance agreement, unless there is a specific statutory provision prohibiting the acquisition of vested rights by any person—in which event, of course, such law would control."

In *Cooper vs. Cooper*, Cal. App. 1957, 305 P. 2d, 906, the husband and wife entered into a property settlement agreement incident to divorce, which provided that various insurance policies were assigned to the wife to be held in trust for the minor chil-

dren. Formal assignments of the policies were not executed and no notice was given the insurance companies. The agreement was not mentioned in the divorce decree. Thereafter the husband, as here, changed the beneficiary to his second wife. The court held that the agreement created a vested interest, subject only to a condition subsequent which never arose, (i.e., the minor children reaching majority). After distinguishing the general rule that the beneficiary has no vested interest prior to insured's death, the court pointed out that "an insured may by contract waive the right to change the beneficiary and convert what is usually the contingent interest of a beneficiary into a vested equitable interest."

In *Hundertmark v. Hundertmark*, 1952, 372 Pa. 138, 93 A. 2d 856, the insured reserved the right to change beneficiaries, and did so after contracting with his estranged wife that she would be the irrevocable beneficiary under the policy. The insurance company was never informed of this agreement. It was held that the agreement made the first wife the contractually irrevocable beneficiary. The court said:

"Our cases have uniformly recognized that a contract not to change the beneficiary, entered into by an insured and his designated beneficiary for a valuable consideration, is binding as between the insured, or his volunteer, and the contractually determined, beneficiary and will be enforced in equity. For example, in *Shepler v. Pennsylvania R. Co.*,

334 Pa. 257, 5 A. 2d 567, 568, where the formerly named beneficiary was denied a right to the proceeds of the policy because there was no consideration for the insured's promise not to change the beneficiary, this court took occasion to note that 'A different situation is created, however, when the member agrees, for consideration, to name a certain person as beneficiary, or, if one has already been named, not to make a substitution.' ''

Shoudy v. Shoudy, 1921, 55 Cal. App. 344, 203 P. 433, involved a property settlement agreement which was contained in a letter to the insured's sister. After the court decree was entered, the insured wrote to the insurance company, telling them he had been divorced but that he wanted his estranged wife to remain beneficiary (without saying irrevocably). Later he changed the beneficiary in favor of a second wife. The court held the first wife had a vested equitable interest which could not be divested by changing the beneficiary. Other cases holding similarly are *Goodrich v. Massachusetts Mutual Life Ins. Co.*, Tenn. 1941, 240 S.W. 2d 263; *Waltz v. Travelers Ins. Co.*, D.C. Tenn. 1954, 124 F. Supp. 465; *Locomotive E. Mut. L. & Acc. Ins. Ass'n v. Locke*, A. 37, 251 App. Div. 146, 295 N.Y.S. 689, Aff'd 277 N.Y. 584, 13 N.E. 2d 781; *Prudential Ins. Co. of America v. Rader*, D.C. Minn. 1951, 98 F. Supp. 44; *Jacoby v. Jacoby*, 1943, 69 S.D. 432, 11 N.W. 2d 135; *Thompson v. Thompson*, 8 Cir. 1946, 156 F. 2d 581.

Factual distinctions between the instant case and those cited do no violence to the rule of law which is applicable here. The insured and his then wife entered into a contract which provided that she would either share in the proceeds of an insurance policy (provided both parties were living on September 27, 1970) or receive the entire proceeds (provided she outlived her estranged husband and he died prior to the date the policy became payable). This agreement was not contained in the divorce decree, but this is not necessary. *Prudential Ins. Co. v. Rader*, *supra*.

In some of the cases cited above the separation agreement provided that the beneficiary should remain irrevocable. Counsel for plaintiff argue that this case accordingly is distinguishable. It does not appear, however, that the use of the word "irrevocable" in itself has any legal import, but, rather, that the effect of the words used should be controlling. An agreement whereby the proceeds of an insurance policy are, in every conceivable event, disposed of, is tantamount to the designation of an irrevocable beneficiary. The proceeds were, at the execution of the agreements, vested subject only to conditions subsequent mentioned in the agreement. Plaintiff does not allege or argue that the agreement was not entered into, or that the parties thereto did not intend its obvious portent. Her theory seems to be that although it was the intent of the insured when he signed the agreement to relinquish the proceeds of the policy to his wife, subject to certain

conditions, his failure to notify the insurance company and his subsequent affirmative act changing beneficiaries, deprived his estranged wife, without her consent, of the policy proceeds. Such avoidance of contractual obligations should not be permitted if the agreement is enforceable.

The greater force of plaintiff's argument is directed to the contention that the property settlement agreement is violative of the public policy of Montana and accordingly void and unenforceable. The rule is well established that any agreement between husband and wife intended to facilitate the procurement of a divorce is contrary to public policy and void. *Stebbins v. Morris*, 19 Mont. 115, 47 P. 642; *Sherman v. Sherman*, 65 Mont. 227, 211 P. 321; *Clary v. Fleming*, 60 Mont. 246, 198 P. 546, *Brown v. Brown*, 8 Cal. App. 2d 364, 47 P. 2d 352; 17 Am. Jur. Divorce and Separation, Sec. 14, P. 156, and cases there cited. Agreements conditioned on divorce are likewise generally held to be against public policy, *I bid.*, Am. Jur.

Defendant contends that the instant agreement does not facilitate a divorce but is merely a disposition of property between the estranged husband and wife. The court cannot agree. The agreements were obviously to become operative in the future, and only upon the condition that a divorce proceeding was instituted. Further, if one party did not institute the proceeding, the other party was given the right to do so. Moreover, resistance to the divorce would render the property settlement agreement

nugatory. The agreements construed together facilitated the divorce and are void. *Sherman v. Sherman*, supra. The fact that the provisions most clearly rendering the agreement void were put in a supplementary agreement does not change this result. The agreements must be read together. Section 13-708, Revised Codes of Montana, 1947; *Hodgkiss vs. Northland Petroleum Consolidated, et al.*, 104 Mont. 328, 57 P. 2d 811; *Ryan vs. Bloom*, 120 Mont. 443, 186 P. 2d 879; *Doheny vs. United States Fidelity and Guaranty Co.*, 34 Fed. Supp. 888.

Having concluded that the agreements construed together violated public policy and were void, may defendant rely upon any portion of the contract in this action? Plaintiff argues that defendant is not entitled to rely upon any portion of a void contract and cannot accordingly recover in this action. There is respectable authority in support of that position.

Other cases hold, however, that the contract may be severable and legal portions enforced. The general rule is stated by Williston on Contracts, Vol. 1, p. 470, as follows: "If consideration is even partially illegal the whole agreement is tainted unless the legal portion of the agreement is severable."

The Montana Supreme Court has held severable property settlement agreements which clearly facilitated divorce and were accordingly void. In *Herrin vs. Herrin*, 1936, 103 Mont. 469, 63 P. 2d 137, the court said:

“The second error is on the conclusion of the trial court that the agreement between the parties by which plaintiff turned over certain property to the defendant, and in which agreement reference is made to separation and divorce, is void on the ground of public policy. We think the court’s ruling that such contract is void on the ground of public policy is correct insofar as it relates to a divorce. The testimony of Judge Galen, who drew the agreement for the parties, substantially supports the contention of counsel for defendant that such agreement comes within the rule laid down in *Sherman v. Sherman*, 65 Mont. 227, 211 P. 321, 323, where this court said: ‘If, however, the agreement be entered into with the intent of bringing about or facilitating a divorce, it will be declared void.’ But we think it repugnant to sound principles of equity to permit one to profit by the provisions of such an agreement and then avoid its objectionable parts by invoking the rule mentioned, and we, therefore, hold the contract to be separable. This conclusion is one of first impression in this jurisdiction in actions of this nature so far as our research reveals; but there is authority for such a rule in actions at law (citing cases), and we think such a holding is fair and equitable and does substantial justice between the parties. The contract is, therefore, held to have been entered into for the purpose of facilitating a divorce, and as to that it is void as contrary to public policy, but as to the property settlement it is valid and binding upon both parties.”

Likewise, in *Ryan v. Ryan*, 1940, 111 Mont. 104, 106 P. 2d 337, the suit was to enforce a separation agreement entered into collusively and therefore illegal. The court reviewed its decisions in *Grush v. Grush*, 90 Mont. 381, 3 P. 2d 402, and *Herrin v. Herrin*, *supra*, and concluded that under the law as stated in those cases, the agreement was separable, and that the consideration supporting the legal portion of the contract was the wife's relinquishment of her property rights. The same reasoning is applicable here.

Plaintiff argues that these Montana cases are distinguishable for the reasons that (1) the party seeking the benefit (defendant herein) is the spouse to whom the decree of divorce was granted, pursuant to the collusive agreement; (2) if anyone benefited from the illegal agreement, it was the wife and not the husband; and (3) the plaintiff herein was not a party to the illegal contract and received no benefit therefrom. While the wife (defendant herein) obtained an uncontested decree of divorce, the agreement specifically provided that if she did not file an action by a certain date, her husband could do so. It cannot be determined from the record which, if either party, received the greater benefit from the contract. The wife presumably released certain property rights in consideration for the property settlement portion of the agreement. Presumably the other provisions of the property settlement agreement have been performed. The wife would have the same right as her husband to enforce the property settlement, if the agreement is separable.

It is true that plaintiff was not a party to the agreement, but she does seek to avoid the effect of a contract which her husband had entered into prior to their marriage with respect to property acquired prior to marriage. No part of the premium on the policy in question was paid subsequent to plaintiff's marriage to the insured. It was a single premium policy, paid in full while insured was married to defendant. Under these circumstances, plaintiff can acquire no greater equity than the insured by virtue of her appointment as beneficiary. Under the Montana decisions the insured could not have relieved himself of the effect of this agreement; nor can his appointee.

Defendant will prepare judgment in accordance with this opinion.

/s/ W. J. JAMESON,
United States District Judge.

[Endorsed]: Filed July 13, 1957.

In the District Court of the United States for the
District of Montana, Great Falls Division

Civil No. 1828

WESTERN LIFE INSURANCE COMPANY, a
Corporation,

Plaintiff,

vs.

VIRGINIA K. BOWER and MABLE CLAIRE
BOWER, Also Known as and Called MABEL
N. BOWER,

Defendants.

VIRGINIA K. BOWER,

Plaintiff in Interpleader,

vs.

MABLE CLAIRE BOWER, Also Known as and
Called MABEL N. BOWER,

Defendant in Interpleader.

JUDGMENT

This cause having been submitted by the plaintiff in interpleader and the defendant in interpleader upon an agreed statement of facts and the same having been submitted to this court for consideration and decision, and, after due deliberation thereon, the court having filed its order and decision in writing ordering that judgment be entered herein and in

accordance therewith, in favor of defendant in interpleader, Mable Claire Bower.

Now, Therefore, It Is Ordered, Adjudged and Decreed that Mable Claire Bower, also known as Mabel N. Bower, the defendant in interpleader herein, is the owner of and entitled to payment by the Clerk of this Court to her of the sum of \$10,093.17, less attorney's fees in the sum of \$150.00, allowed by this court to Western Life Insurance Company, original plaintiff herein.

Said moneys shall be paid from the proceeds of Life Insurance Policy Number 89692 of the said Western Life Insurance Company heretofore deposited into the Registry of this Court by said Corporation.

Done in open court this 19th day of August, 1957.

/s/ W. J. JAMESON,

United States District Judge.

[Endorsed]: Filed and entered August 21, 1957.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that Virginia K. Bower, Plaintiff in Interpleader above named, hereby appeals to the United States Court of Appeals for the

Ninth Circuit from the final judgment entered in this action on August 21, 1957.

/s/ H. CLEVELAND HALL,

/s/ EDW. C. ALEXANDER,

Attorneys for Appellant,
Virginia K. Bower.

[Endorsed]: Filed August 26, 1957.

[Title of District Court and Cause.]

DESIGNATION OF POINTS TO BE
RELIED UPON BY APPELLANT

Whereas, Virginia K. Bower, plaintiff in interpleader, has perfected an appeal to the United States Court of Appeals for the Ninth Circuit from a judgment and decree made and entered in the above cause on the 21st day of August, 1957, and has served her designation of the portions of the record in said District Court to be transmitted to said Court of Appeals;

Now, Therefore, said appellant now designates the following points which she intends to rely upon on said appeal:

1. The Court erred in adjudging that the defendant, Mable Claire Bower, also known as Mabel N. Bower, was the owner of and entitled to payment by the Clerk of the District Court of the sum of \$9,943.17 out of the Registry of the Court, which sum represented the proceeds of a life insurance

policy, less the sum of \$150.00 attorneys' fees, issued by Western Life Insurance Company to and upon the life of Joseph Edward Bower of which the plaintiff, Virginia K. Bower, was the named beneficiary, which judgment was based upon the following erroneous conclusions:

(a) That a portion of the agreement between Mable Claire Bower and Joseph Edward Bower was legal.

(b) That the portion of the agreement assumed to be legal was severable from the illegal portion and thus enforceable.

(c) That there was a consideration for the portion of the agreement assumed to be legal, to wit, a presumption that she released her property rights.

(d) That the considerations for the legal portion of the agreement was separate and severable from the consideration for the illegal portion of the agreement.

Dated this 30th day of August, 1957.

VIRGINIA K. BOWER,

By /s/ H. CLEVELAND HALL,

/s/ EDW. C. ALEXANDER,

Her Attorneys.

[Endorsed]: Filed September 3, 1957.

[Title of District Court and Cause.]

SUPERSEDEAS BOND ON APPEAL

Know All Men by These Presents:

That we, Virginia K. Bower, as principal, and Hartford Accident and Indemnity Company, as surety, are held and firmly bound unto Mable Claire Bower, also known as Mabel N. Bower, in the full and just sum of \$500.00, to be paid to the said Mable Claire Bower, also known as and called Mabel N. Bower, her attorneys, heirs, administrators, executors and assigns, to which payment, will and truly to be made, we bind ourselves, our heirs, executors, administrators, successors and assigns, jointly and severally by these presents.

Sealed with our Seals and dated this 29th day of August, 1957.

Whereas, lately at a session of the District Court of the United States for the State of Montana, in a suit pending in said Court designated as Civil No. 1828, between Virginia K. Bower, plaintiff in interpleader, and Mable Claire Bower, also known as and called Mabel N. Bower, defendant in interpleader, judgment was duly made, given and entered that the said Mable Claire Bower was the owner of and entitled to payment of the sum of \$9,943.17, deposited in the Registry of this Court by Western Life Insurance Company, a corporation, pursuant to Order of this Court, dated February 16, 1956; and the said Virginia K. Bower having

filed with the said District Court a Notice of Appeal as provided by the Rules of Civil Procedures; and this Court upon petition of said Virginia K. Bower and after due notice and hearing fixed the amount of supersedeas bond to be given and filed by said Virginia K. Bower;

Now the condition of the above obligation is such, that if the said Virginia K. Bower shall prosecute her said appeal to effect and shall answer and pay all costs of said action in the District Court and on appeal, together with interest on said above sum from the date of Judgment and damages for delay if she fails to make her plea good, or if the appeal is dismissed or the judgment is affirmed, or such costs of the Appellate Court may award if the judgment is modified, then the above obligation to be void; otherwise to remain in full force and effect.

[Seal] /s/ VIRGINIA K. BOWER,

[Seal] HARTFORD ACCIDENT AND IN-
 DEMNITY COMPANY,

By /s/ C. R. LOWERY,
 Attorney-in-Fact.

Approved this 3rd day of September, 1957.

/s/ W. J. JAMESON,
 Judge.

[Endorsed]: Filed September 4, 1957.

[Title of District Court and Cause.]

STIPULATION WITH RESPECT TO
DESIGNATION OF RECORD ON APPEAL

It is hereby stipulated by and between the above-named parties, Virginia K. Bower, plaintiff, and Mable Claire Bower, also known as and called Mabel N. Bower, defendant, that the designation of record on appeal heretofore made on behalf of said plaintiff and signed in the office of the Clerk of the District Court on August 26, 1957, be and the same is hereby approved and adopted by the defendant, Mable Claire Bower, as her designation of the record on appeal in said cause.

Dated this 30th day of August, 1957.

VIRGINIA K. BOWER,

By /s/ H. CLEVELAND HALL,

/s/ EDW. C. ALEXANDER,

Her Attorneys.

MABLE CLAIRE BOWER,

By /s/ WILLIAM A. BROWN,

Her Attorney.

[Endorsed]: Filed September 4, 1957.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
District of Montana—ss.

I, Dean O. Wood, Clerk of the United States District Court for the District of Montana, do hereby certify that the annexed papers, to wit:

Agreed Statement of Facts.

Exhibit "A" to Complaint in Interpleader, which is attached to Complaint in Interpleader.

Exhibit "A," attached to Answer and Cross-Complaint of Mable Claire Bower.

Plaintiff's Motion for Summary Judgment.

Defendant's Motion for Summary Judgment.

Order and Opinion of the Court, filed July 13, 1957.

Judgment.

Notice of Appeal.

Supersedeas Bond on Appeal.

Designation of Record on Appeal.

Designation of Points to Be Relied Upon by Appellant.

Stipulation With Respect to Designation of Record on Appeal.

are the originals filed in Case No. 1828, Western Life Insurance Company, a corporation, Plaintiff, vs. Virginia K. Bower and Mable Claire Bower, also known as and called Mabel N. Bower, Defendants, and Virginia K. Bower, Plaintiff in Interpleader,

vs. Mable Claire Bower, also known as and called Mabel N. Bower, Defendant in Interpleader, and designated by the parties as the record on appeal in said cause.

Witness my hand and the seal of said Court at Great Falls Montana, this 5th day of September, A.D. 1957.

[Seal]

DEAN O. WOOD,

Clerk as Aforesaid;

By /s/ ELIZABETH C. McKEE,

Deputy Clerk.

[Endorsed]: No. 15717. United States Court of Appeals for the Ninth Circuit. Virginia K. Bower, Appellant, vs. Mable Claire Bower, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Montana.

Filed September 10, 1957.

Docketed: September 19, 1957.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

No. 15721

IN THE
United States
Court of Appeals
FOR THE NINTH CIRCUIT

RESERVE LIFE INSURANCE COM-
PANY, a Corporation,

Appellant,

vs.

DONALD E. MARR, as Guardian of the
Estate and Person of MARY I. MARR,
Appellee.

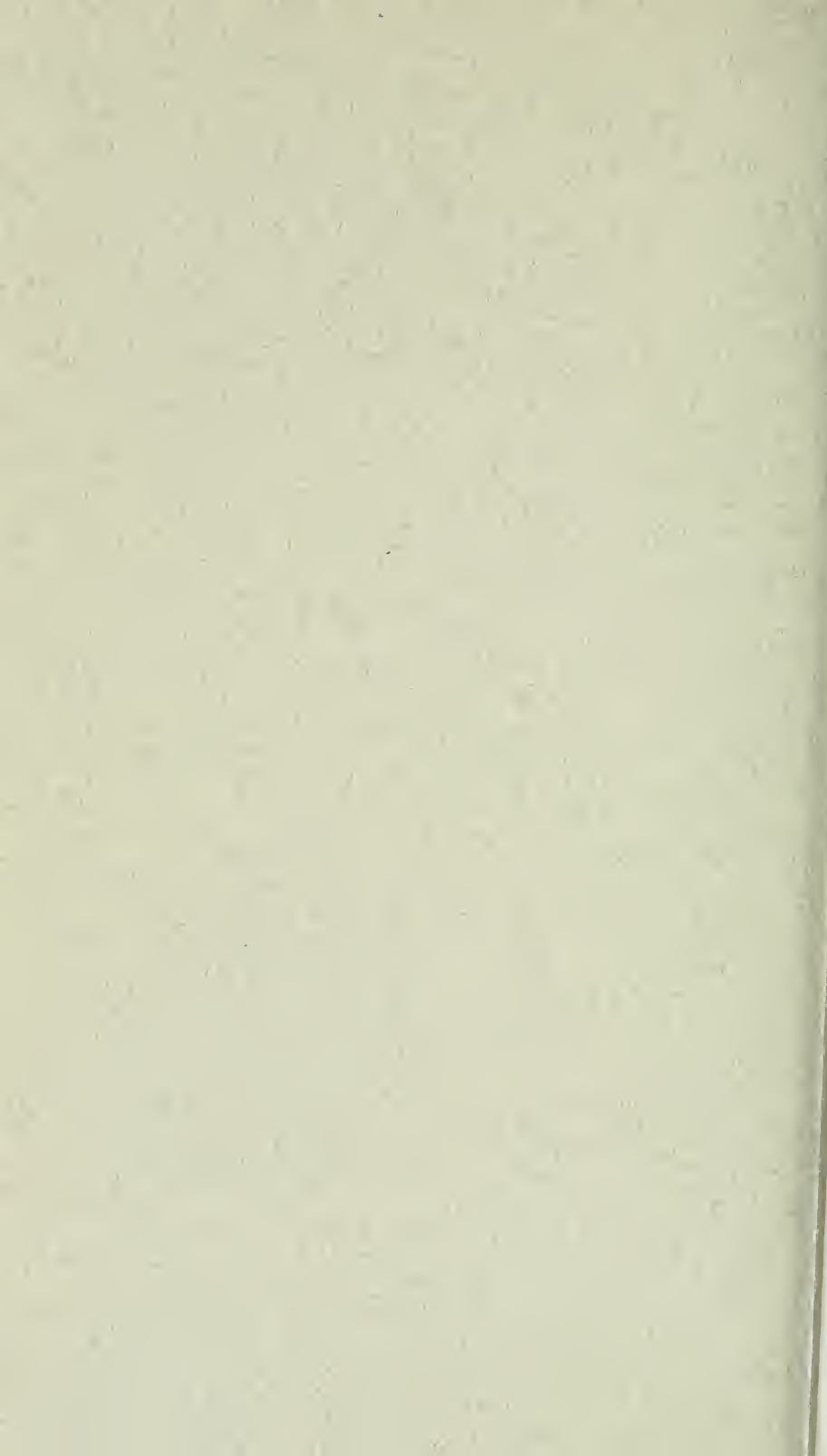
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Appellant's Reply Brief

*On Appeal from the District Court of the United States
for the Eastern District of Washington.*

G. J. SILVERNALE, Jr.
PAINE, LOWE, COFFIN AND HERMAN
Spokane, Washington

Attorneys for Appellant



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EVIDENCE

The Appellee has taken liberties with the undisputed evidence and testimony submitted herein that must be corrected. On pages 2 and 3 of the Appellee's Brief, he would have this Court believe that the medical condition of the plaintiff as it existed when she was placed in the Jane O'Brien nursing home facilities, continued thereafter until approximately six months before trial. That this is not so is evident from the testimony of the attending physician, Dr. Rowe, who stated that her condition had stabilized after a few weeks. From that time forward, her condition remained the same and she required only nursing home care. Defendant's Exhibits 15 and 16, clearly indicate that Dr. Rowe himself considered her treatment and his visits as nursing home care. Defendant's Exhibit 15 is an Attending Physician's Statement, dated May 3, 1956, wherein Dr. Rowe referred to his professional visits as "Nursing Home Calls." Defendant's Exhibit 16, consists of Dr. Rowe's own office records of billing and accounting and therein his professional calls were designated as nursing home calls by using the abbreviation "N.H.C."

Appellee draws the court's attention to the opinion of John Canwell, a shareholder, officer and director of the corporation owning the Jane O'Brien hospital, that the facilities constituted a recognized hospital. His opinion was based upon observations of hospitals situated in Prosser, Kennewick, and Lake Chelan, all in Washington and others in Idaho and Montana. In the Transcript of Record, pages 72 and 73, John Canwell, on Voir Dire Examination, testified as follows:

“Q. What institution was it concerned with?

A. We had the Prosser Hospital, Kennewick Hospital, Lake Chelan Hospital, St. Joseph’s Hospital in Montana, Bonner County Hospital, and Sandpoint.

Q. These are all generally recognized hospitals, is that correct?

A. They are all recognized hospitals.

Q. They maintain surgeries, is that correct?

A. Yes.

Q. And maintain an active laboratory, perform obstetrics, that type of hospital is what you are familiar with, is that correct? A. Yes.

Q. And they generally had a staff of physicians supervising the operation of the institution; that is, a staff (31) physician, reviewing procedures, treatment record, and so forth?

A. Yes, I believe all of the hospitals had medical staffs.”

Recognized licensed hospitals in the area of Eastern Washington, Northern Idaho and Western Montana maintain surgeries, laboratories and facilities under the supervision of a medical staff according to the testimony of Mr. Canwell himself. The testimony of Lawrence Trousdale, an expert witness, administrator of a licensed hospital and a Trustee of the Washington State Hospital Association substantiates that of John Canwell that surgeries, laboratories and medical staffs are prerequisites for any institution in this area that holds itself out as caring for the acutely ill. The learned trial judge in rendering his oral opinion, misconceived this very point when he spoke of hospitalization in an “identical type” of institution as not being covered in Spokane, Wash-

ington, but being covered if occurring in a smaller community. Confinement, whether it be in Spokane, Prosser, Kennewick, or elsewhere would not be covered under the insuring agreements herein where the institution failed to maintain a surgery, or a laboratory or a medical staff responsible for the supervision of its facilities. As is evident from Canwell's testimony, the learned trial judge was in error in drawing the conclusion that these smaller community, licensed hospitals, did not provide laboratory and surgical facilities under the supervision of a competent medical staff.

Appellee states on page 4 of her brief as follows:

“Jane O'Brien Hospital at all times pertinent to this case had a *laboratory*, x-ray equipment, permanent and full time facilities for the care of over night residents, *each of which was under the supervision of the licensed doctor of medicine* and had a graduate registered nurse always on duty, with hospital charts for each patient.” (Emphasis supplied)

Appellee makes no reference to any portion of the Transcript of Record, and of course, this emphasized portion is unsupported by the Transcript of Record. The Appellee has taken no issue with the Appellant's statement of the Evidence with regard to the lack of a laboratory and a surgery, and the absence of supervision by a licensed Doctor of Medicine over the facilities for the care of over night resident patients. This very failure of the Appellee to challenge or dispute Appellant's statement of the Evidence clearly demonstrates that there is little if any disagreement with respect to the operation and facilities of the Jane O'Brien Hospital at all times material herein.

Appellee next seeks to avoid that portion of the definition of a hospital requiring that the facilities for the care of over night resident patients be under the supervision of a licensed Doctor of Medicine by arguing that each patient has his or her own attending physician. The court's attention is directed to the two policies of insurance introduced herein. Policy No. J-448274, the last sentence of the last full paragraph provides as follows:

"Benefits provided under this part 1 shall be payable only if such services and materials are furnished at the direction of and under the supervision of a licensed Doctor of Medicine or Osteopathy other than the insured or member of the family group."

Policy No. A-448274, second paragraph, part 1 provides:

"Benefits under this policy shall be payable only if such confinement is at the direction of and under the supervision of a licensed Doctor of Medicine or Osteopathy other than the insured or member of the family group."

Each policy specifically provides that the confinement must be under the supervision and direction of a physician. By clear and unambiguous language, not only the hospital facilities, but also the patient must be under the supervision of a licensed Doctor of Medicine.

The Appellee, on page 6 of her brief, alludes to a claim for confinement at the Jane O'Brien Hospital during 1954-1955 paid one James W. Reigart. A Specimen Policy, Defendant's Exhibit No. 13 was admitted into evidence. An examination of this policy will indicate that it contained no definition whatsoever of a hospital. At the time the claim was made, the Appellant conducted an investigation. This Court's attention is directed to Defendant's Exhibit No. 14,

an Information Report submitted by Dorothy Blage, Administrator, relating to the nursing home. When the claim of Reigart was paid, the Information Report was marked "OK except policies defining 'Hosp' Watch claims closely—4/26/55 JWA." In the absence of a definition, this claim would have fallen within the rule that where the contract of insurance fails to define the term hospital, the courts will follow the dictionary meaning. For examples see:

McNichols v. Denver, 209 P. (2d) 910 (Colo.—1949);
National Bankers Life Ins. Co. v. Hornbeak, 266 S.W. (2d) 228, (Tex.—1954).

It is also a well recognized rule of law that the fact that an insurer saw fit to pay a claim under the terms of a then existing policy, prior to the present litigation, whether because the language was different, or the insurer was not in full possession of all the facts, or the amount involved was inconsiderable, or out of sympathy or otherwise, would not estop it from insisting that in the present action, the plaintiff must bring himself within the coverage of the policy.

Myers v. Metropolitan Life Ins. Co., 33 A. (2d) 253, (Penn.—1943);

Washington Nat. Ins. Co. v. Craddock, 109 S.W. (2d) 165, (Tex.—1937).

ARGUMENT

The Appellee, for the most part on pages 6 through 12, discusses the familiar rule of construction that where a contract of insurance is ambiguous or its meaning in doubt, it will be construed most favorably for the insured. With this general rule the Appellant has no quarrel. The court's

attention is directed to the fact that the trial court did not find the policies herein ambiguous or rely upon ambiguity to sustain its judgment. Likewise, Appellee is unable to point out in any fashion how the definition of hospital, identical in both contracts of insurance, is ambiguous or susceptible to more than a single reasonable meaning. The very silence of the Appellee's Brief with regard to any portion of these definitions being ambiguous, makes it obvious that they are not so. Where the policy, considered as a whole, is clear, precise, and unambiguous in its terms, and its sense is manifest and leads to nothing absurd, there is no field for resort to rules of construction, such as the Appellee cites, to give effect to the policy. 1 *Couch on Insurance*, Sec. 166 Pages 326-327. The rule that an insurance policy must be construed strictly against the company and liberally in favor of those afforded protection by it has no application where the provisions of the policy are neither ambiguous nor difficult of comprehension. The court is not at liberty to revise a contract under the theory of construing it. *Jefferies v. General Cas. Co.*, 46 Wn. (2d) 543, 283 P. (2d) 128, (1955). While ambiguous provisions of an insurance contract will be construed most strongly against the insured, the court is not entitled to disregard plain, explicit language nor give an interpretation at variance with the clearly disclosed intent of the parties. *Davis v. North Am. Acc. Ins. Co.*, 42 Wn. (2d) 291, 254 P. (2d) 722, (1953). See also the cases cited in Appellant's Brief, pages 18, 19 and 20 which are relevant to the above.

Beard v. Peoples Ind. Life Ins. Co. of La., 5 So. (2d) 340, cited by Appellee on three occasions, seems clearly in accord with the Washington authorities cited by Appellant:

“In the construction and interpretation of contracts of insurance, just as with other contracts, the intention of the parties is of paramount importance. This intention is determined in accordance with the plain, ordinary and popular sense of the language which they have used in the agreement, and by giving consideration,

on a practical, reasonable and fair basis, to the instrument in its entirety.

“If the intention is clear, the courts are without right to change the contract in any particular; it is the law between the parties. But if the policy’s language is uncertain or ambiguous, and more than one construction is possible, the construction most favorable to the insured will be applied. Also, if one of two possible interpretations would lead to an absurd conclusion it must be abandoned, and that which appears to be more consistent with reason and probability will be adopted.”

Manifestly, the Appellee has failed to bring her loss within the terms of the insuring contract for the reason that the Jane O’Brien Hospital could not meet the requirements of the hospital definition in three material aspects, i.e.: it maintained no surgery or laboratory and its facilities for the care of over night patients were not under the supervision of a licensed Doctor of Medicine. The rules of construction cited by Appellee provide her no assistance and have no bearing on the case at bar.

Appellee next argues on page 9 that the Appellant was not harmed by the failure of the Jane O’Brien Hospital to meet the provisions of the definition with regard to facilities and medical supervision. Pages 15 and 16 likewise allude to the argument that the nursing home facilities and its supervision were sufficient for the care and medical attention required by the Appellee. At the time the parties

entered into their contract of insurance, it was intended that certain hospitalization benefits would be available for confinement at a particular type of hospital. By their contract, they agreed and stipulated as to what would constitute a hospital. Had they intended coverage in a sanitarium, a rest home, or a nursing home, providing for the care and nursing of semi-invalid, postoperative, or convalescent patients, the contract would have so stated. The insuring agreement further provided that the insured be *necessarily confined* to a particular type of hospital. It is submitted that the testimony of the attending physician, Dr. Rowe sufficiently answers this argument wherein he stated that had the Appellee been confined to a licensed hospital, one providing a laboratory, surgery, and medical staff, she would have not remained there more than several weeks or no longer than one month. Assuming for the sake of argument, that she had been admitted to one of the four licensed hospitals situated in the City of Spokane, and after two to four weeks, discharged therefrom and taken to the Jane O'Brien Hospital, a licensed nursing home for recovery and care, and recalling that Dr. Rowe, the attending physician testified that this is the usual procedure in stroke cases, could it be seriously argued that *Rew v. Beneficial Standard Etc. Co.*, 41 Wn. (2d) 577, 250 P. (2d), 956 would not apply and be controlling. It is apparent that the Appellee was not an acutely ill patient at the time she was placed in the nursing home or her doctor would not have had her taken there. According to the nursing home statutes, the Jane O'Brien Hospital is not licensed to accept acutely ill patients and the acceptance of other than convalescent or chronic patients would have been in violation of their license. Mary I. Marr, the Appellee, never needed

the care offered by the type of hospital provided for in the insuring agreement, and had she been admitted to such a hospital meeting those requirements, she would have been discharged within two to four weeks and the liability of the Appellant terminated after such discharge.

Appellee at page 11 argues that the failure of the Appellant to exclude "psychiatric hospitals" distinguishes the *Rew v. Beneficial Standard, Etc. Co., supra*. The court's attention is directed to the fact that during the first approximately 150 days the Appellee was confined to the Jane O'Brien Hospital, it was licensed as a nursing home, not as a private establishment for alcoholics and the mentally ill, and had been so licensed since July 1, 1954. Further each policy, while not excluding as such psychiatric hospitals, does exclude hospitalization benefits for nervous or mental disorders. Had Appellee been confined for a mental, psychiatric or alcoholic reason, there would have been no coverage even though the institution qualified as a hospital under the policy definition.

At page 17 of Appellee's Brief, it is suggested that it can be argued that there is ambiguity in Reserve Life Policy No. J-448274, for the reason that Part 1 fails to specifically refer to Part 10 which defines the word hospital. Policy A-448274 does so refer to Part 2 which contains the definition of hospital. The definition of a hospital is identical in each policy. Both definitions are prominently displayed and preceded by bold faced type "DEFINITION OF HOSPITAL". These two policies were issued Mary I. Marr on the same date, i.e.: May 4, 1954. By the language used, it cannot be seriously argued that the phrase contained in

the definition that "The word 'hospital' whenever used in this policy means * * *", could refer other than to the type of the institution the contract of insurance contemplated. To place such a strained interpretation upon the contract would effect an absurd and unreasonable result. See *Richards v. Metropolitan Life Ins. Co.*, 184 Wash. 595, 55 P. (2d) 1067; and *Beard v. Peoples Industrial Life Ins. Co. of Am.*, *supra*. It has never been asserted that either counsel or the insured were in any way mislead and of course they were not. The brief treatment given this matter is indicative of the unimportance with which Appellee's counsel attaches thereto.

Appellee, on page 16, asserts that the facilities and supervision of the Jane O'Brien Hospital were equal to if not superior to that found in the *McKinney v. American Security Life Ins. Co.*, 76 So. (2d) 630. This is patently erroneous. The MacDonald Clinic in the *McKinney* case was owned and operated by a licensed Doctor of Medicine. With the exception of x-ray equipment and a registered nurse during part of the night, this clinic had all the attributes usually expected and found in a licensed hospital. It is the equipment, facilities and supervision that constitute a hospital.

"A naked building would not be a hospital. It would require the essential equipment to make it such * * *"

Railey v. City of Magnolia, 126 S.W. (2d) 273, (Ark.—1939).

The Jane O'Brien Hospital has never had a surgery or facilities for obstetrics or the administration of anesthesia or

medical supervision or a radiologist or pathologist or a laboratory technician or x-ray technician, all which are services, facilities, and supervision mandatory if an institution is to accept and care for the acutely ill. The MacDonald Clinic was capable of performing these functions with the exception of x-ray equipment. Thus there is a world of difference between this nursing home and the MacDonald Clinic. A licensed nursing home providing registered nurses always on duty and making available to physicians with patients therein, a portable x-ray unit hardly rises to the dignity of a hospital, either under the insuring agreement or as the term hospital is generally understood. That the two insuring agreements contemplated confinement in an institution which could perform these services and provide supervision is clear from its provisions and its schedules of benefits. The Jane O'Brien Hospital can further be distinguished from the MacDonald Clinic in that it has never provided facilities for the delivery of over 150 babies a year or received any of its revenue under health and accident policies or been recognized by insurance carriers who regularly paid claims therein for confinement. Where the State of Washington in licensing institutions for the care of the acutely and chronically ill distinguishes between institutions with and without a surgery, it cannot be asserted that insurance contracts making the same distinction are either unreasonable or unrealistic.

Counsel for Appellee at page 19 of his Brief questions the cases cited by Appellant which hold that the burden of proof rests upon the insured to prove the occurrence of expenses within the coverage of the hospital and medical care

insurance contract. It is to be observed that Appellee fails to cite cases in support of her opinions. In addition to the cases cited in Appellee's Brief, page 17, the writer cites the following as substantiating his construction of the general rule.

Commonwealth Life Ins. Co. v. Wood, 206 Okla 203, 242 P. (2d) 446, (Okla.—1952)

Preferred Life Ins. Co. v. Stephenville Hospital, 256 S.W. (2d) 1006, (Tex.—1953)

Imperial Life Ins. Co. v. Thornton, 138 S.W. (2d) 295, (Tex.—1939).

On page 22 of Appellee's Brief, 12 *Am. Jur.*, Sec. 343, page 900, is mentioned with regard to substantial performance. As is apparent this quoted portion of *Am. Jur.* is to be found under contracts generally. The balance of that paragraph quoted by Appellee is as follows:

“Although a plaintiff is not absolutely free from fault or omission in every particular, the court will not turn him away if he has in good faith made substantial performance, but will enforce his rights on the one hand, and preserve the rights of the defendant on the other, by permitting a recoupment. Strict compliance with every specification of a contract is not of the essence of a contract, unless made so by the terms of the contract or by necessary implication. Accordingly, where one party to a contract has received and retained the benefits of a substantial partial performance of the agreement by the other party who has not fully performed all his covenants, the first party cannot retain the benefits and repudiate the burdens of the contract, but he is bound to perform his part of the agreement, and his remedy for the breach is limited to compensation in damages. Where a contract has been partly performed by one party and the other has derived a substantial benefit therefrom, the latter cannot refuse to comply with its terms simply because the former fails

to complete performance. Where there has been part performance and there is a breach of a promise which goes to only a part of the consideration and the breach may be compensated for in damages, the breach does not relieve the other party from his obligation to perform his promise. In order to operate as a discharge, the partial failure to perform must go to the very root of the contract. But a breach that goes to the essence of the contract justifies a refusal of the other party to perform his promise or discharges his obligation to perform, even though there has been part performance. In other words, a breach of a promise which goes to the whole consideration gives to the injured party the right to treat the entire contract as broken. Where the failure to perform part of a contract is in regard to matters which would render the performance of the rest a thing different in substance from what was contracted for, the party not in default may abandon the contract. A plaintiff who has committed a substantial breach cannot recover where the promises are dependent. It may be observed that where there is such a material breach, the plaintiff has not substantially performed."

The following cases cited in Appellee's Brief have to do with construction of contracts and not insurance agreements:

Woodruff v. Hough, 91 U. S. 596, 23 L. ed. 332;
Lautenbach v. Meredith, 240 Iowa 166, 35 N.W. (2d) 870;
Winfield Mutual Housing Corp. v. Middlesex Concrete Products & Excavating Corp., 39 N. J. Supra 92, 120 A. (2d) 655.

Newport v. Newport & C. Bridge Co., 90 Ky. 193, 13 S.W. 720, 8 L.R.A. 484, pertained to compliance with a city ordinance while *Ambassador Bldg. Corp. v. St. Louis Amsterdam Theatre*, 238 Miss. App. 600, 185 S.W. (2d) 827, related to a lease construction and *King v. Hintze*, 2 Utah

(2d) 166, 270 P. (2d) 1095, to the construction of a mining agreement. Not any of these cases has any real bearing on the issues under consideration other than as they relate to contracts generally.

The only case dealing directly with an insurance contract is *Porter v. Trader Ins. Co.*, 164 N. Y. 504, 58 N.E. 641, 52 L.R.A. 424, in which the Court held that substantial compliance means that the insured has complied with all of the terms and conditions of the insuring agreement other than those of an unimportant, trifling or immaterial nature. See *Inter-Southern Life Ins. Co. v. Cochran*, 83 S. W. (2d) 11, (Ky.—1935) involving change of beneficiaries and *La Hood v. National Union Fire Ins. Co.*, 153 So. 695; (La.—1934) involving an iron-safe clause in a fire policy. While generally speaking the rules established for the construction and interpretation of general contracts are applicable to policies of insurance, the authorities cited by Appellee are founded upon the proposition that substantial performance, being other than literal, full or exact performance in every detail, will prevent a forfeiture, the other party is entitled to compensation or deductions from the contract price because of the defective performance. For a Washington case concerning compliance with a lien notice statute requirement, the Court's attention is directed to *Fidelity & Deposit v. Conway*, 14 Wn. (2d) 551, 128 P. (2d) 764, (1942). The court correctly analyzed the danger at page 560 of their opinion in allowing a substantial departure from the statute under the theory of substantial compliance, as the result would be, in effect, to nullify the statutory provisions. As has been pointed out earlier in this Reply Brief, the Jane O'Brien Hospital deviated from the hospital definition in

a substantial and material degree, as distinguished from trifling, unimportant and immaterial in nature. The lack of a surgery or a laboratory and lack of any supervision by a licensed Doctor of Medicine over its facilities for the care of over night resident patients very substantially varies from the definition upon which the parties agreed to be bound. This court is not at liberty under a theory of substantial compliance to rewrite the policy definition or strike therefrom these three material contract requirements.

Appellant acknowledges the general applicability of Rule 52(a) of the Rules of Civil Procedure (28 U.S.C.A. Sec. 723c) on appeals as pointed out in Appellee's Brief on pages 24 and 25. However, this rule has certain modifications which bear on the effect of Findings of Fact where they are based upon uncontradicted testimony and evidence. This qualification to that portion of Rule 52(a), providing that:

“* * * Findings of Fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witness” * * *,

was considered by Circuit Judge Garrecht of the Ninth Circuit, in the case of *Home Indemnity Co. of N.Y. v. Standard Acc. Ins. Co.*, 167 F. (2d) 919, (1948). Briefly, an insured became involved in a hit and run accident and during the several weeks following the accident, told his insurance carrier, the police and others, four different versions of the accident before entering a plea of guilty to a criminal charge. The insurance carrier denied coverage for the reason that the insured had failed to cooperate with

the company as required by the policy. The trial court held that the insurance carrier had not been in anywise prejudiced by the actions or statements or omissions of the insured and that the carrier was bound to enter into his defense.

On appeal, this Court considered the weight to be given to the trial Judge's Findings of Fact and the applicability of Rule 52(a). Like in the matter at bar, there was no serious dispute as to the factual aspects upon which the insurer denied liability under the insurance contract. In the matter at hand, there is little, if any, dispute as to the testimony or documentary evidence and as is pointed out earlier in this Brief, Appellee took no material issue with the evidentiary statement of the Appellant set forth in its Opening Brief. Quoting from this decision, Judge Garrecht held:

“The court found, however, that the appellant ‘has not been in anywise prejudiced by any action or statement or omission of George White.’ This is a conclusion of law, or at most, an inference from undisputed facts, which we are in as good a position to make as was the trial court.

“In *United States v. United States Gypsum Company*, 68 S. Ct. 525, at page 541 the Supreme Court, in dealing with a situation comparable to that which confronts us here, said:

“ ‘Insofar as this finding and others to which we shall refer are inferences drawn from documents or undisputed facts, heretofore described or set out, Rule 52(a) of the Rules of Civil Procedure (28 U.S.C.A. following section 723c) is applicable. That rule prescribed that findings of fact in actions tried without a jury ‘shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to

judge of the credibility of the witnesses." It was intended, in all actions tried upon the facts without a jury, to make applicable the then prevailing equity practice. Since judicial review of findings of trial courts does not have the statutory or constitutional limitations of findings by administrative agencies or by a jury, this Court may reverse findings of fact by a trial court where "clearly erroneous". The practice in equity prior to the present Rules of Civil Procedure was that the findings of the trial court, when dependent upon oral testimony where the candor and credibility of the witnesses would best be judged, had great weight with the appellate court. The findings were never conclusive, however. A finding is "clearly erroneous" when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. * * *

It is submitted that those portions of Findings of Fact VIII, on Appellee's First Cause of Action, and Findings of Fact IV, of Appellee's Second Cause of Action, which held:

"That there has been *substantial performance* by the Jane O'Brien Hospital according to the definition as set out in * * *" (Emphasis Supplied)

constitutes "* * * a conclusion of law, or at most, an inference from undisputed facts, which * * *" this court is "* * * in as good a position to make as was the trial court."

Home Indemnity Co. of N.Y. v. Standard Acc. Ins. Co., supra p. 923.

Neither the demeanor of the witnesses nor their credibility was seriously involved at the time of trial. Thus this court is free to draw ultimate inferences and conclusions which

the evidentiary findings reasonably induce, where the evidence is entirely documentary or the facts are not in dispute.

See:

Carter Oil Co. v. McQuigg, 112 F. (2d) 275, (CCA 7th 1940)

Smyth v. Barneson, 181 F. (2d) 143, (CCA 9th 1950)
Kaufman-Brown Potato Co. v. Long, 182 F. (2d) 594,
 (CCA 9th 1950)

Moore's Federal Practice, Vol. 5, Sec. 52.04, p. 2637;
2 Federal Practice and Procedure, Vol. 2, Sec. 1132,
 pp. 832-3.

Appellant does not retreat in the least from its position, maintained in the Opening Brief, that the Jane O'Brien Hospital is not and never has been a recognized hospital within the hospital definition contained in the insuring agreement and, further, that the Appellee was not necessarily confined to a hospital of the type contemplated by the insurance contract for the reason that she did not require that type of hospital service.

Respectfully submitted,

PAINE, LOWE, COFFIN AND HERMAN

By G. J. SILVERNALE, Jr.

Attorneys for Appellant.

No. 15721

IN THE
United States
Court of Appeals
FOR THE NINTH CIRCUIT

RESERVE LIFE INSURANCE COM-
PANY, a Corporation,

Appellant,

vs.

DONALD E. MARR, as Executor of the
Estate of MARY I. MARR, Deceased,
Appellee.

No. 15,721

Petition for Rehearing

*On Appeal from the District Court of the United States
for the Eastern District of Washington.*

PAINE, LOWE, COFFIN AND HERMAN
Spokane, Washington

Attorneys for Appellant

FILED

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The Appellant above named respectfully petitions this Honorable Court for rehearing of the Appeal in the above entitled cause or in the alternative for a hearing en banc, and in support of said Petition represents to the Court as follows:

Appellant reserves its argued position as to each of the points of the Appeal but in this Petition addresses itself to those features of the decision wherein Appellant believes the Court may be convinced its result is based upon an erroneous interpretation of the word “has”, and upon the application of incorrect legal principles.

The court in its opinion in the first full paragraph of page 4 asks the following question: “If such be the object to be accomplished, (. . . to meet the standard of a hospital which the company determined would guarantee to the policy holders a high standard of care when hospitalized. . . . on the theory that the better the care the sooner the patient would be released and thereby minimize the expenses to the company) what difference would it make to a recovery whether the named facilities were under one management so long as the care was expertly provided and readily at hand?” The answer to this question is found in the testimony of Dr. Rowe on pages 145 and 146 of the Transcript of Record where he testified that had the patient been admitted to either The Deaconess or St. Luke’s Hospital (hospitals admittedly providing the named facilities and staff required by the definition of the contracts, see pages 128 through 131 of the Transcript of Record) the patient would have been discharged in a matter of approximately a month. This very case is a vivid example that the

mere availability of the named facilities as distinguished from their ownership and operation will not accomplish the objective of a higher standard of care which in turn would see an earlier release of the patient and minimize the expenses of the company. Stated in another way, an institution which has these named facilities is not going to keep a person confined who no longer needs these facilities while an institution which merely has available these named facilities, may keep a patient many months after the need for the facilities has passed, as witness the case at hand. Thus the mere availability of these facilities does not guarantee the policy holder a high standard of care so that he will be released sooner and thereby minimize the company's expense, and the objective of the definition, as set forth by this Court, is made ineffectual by the facts of this case in that there is imposed upon the insurer a fourteen month liability, rather than a one month liability.

Apparently the controlling legal principle of the Court's decision appears in the first full paragraph on page 4 of the opinion wherein the Court states:

"In so deciding we are not disregarding plain and explicit language but holding that a *liberal construction of the language of the policies supports* the finding of the trial court that the facilities furnished by the hospital in which the insured was confined were in substantial compliance with the definition of a 'hospital' contained in the policy." (Emphasis supplied)

In effect the Court held that the facilities furnished by the Jane O'Brien Hospital complied with the definition of a hospital as contained within the policy. This conclusion is substantiated by that portion of the opinion which observes

that the policies do not specifically require that either the laboratory or the surgery be on the premises or within the confines of a building or buildings owned and operated by the confining institution as an integrated whole.

The word or phrase liberally construed in favor of the object to be accomplished was "has". Manifestly the language ". . . an operating room where major surgical operations may be performed . . .", is neither ambiguous nor indefinite and the court's decision does not so hold. Rather the Court, in applying the rule of liberal construction, held that the language ". . . an institution which has . . .", should be construed to mean an institution which either makes available or furnishes certain facilities as set forth in the definition of a hospital contained in the policies.

The rule that contracts of insurance are to be liberally construed to accomplish the purpose for which they are made is a well established rule of construction. Yet it is a cardinal principle of insurance law that the insurance contract will not be liberally construed in favor of the insured and strictly against the company unless there is doubt, uncertainty or ambiguity as to its meaning and the contract is fairly susceptible of two interpretations, one in favor of the insured and the other favorable to the company.

Handely v. Oakley, 10 Wn. (2d) 396, 116 P. (2d) 781;
Green v. National Casualty Co., 87 Wash. 237, 151 Pac.
 509;

"Appellant seems to argue that the policy sued upon was intended to give protection against an absconding vendee, and that, under the familiar rule that the policy must be liberally construed in favor of the insured and strictly against the insurer, we should re-

verse the action of the trial court. The trouble with this argument is that the language of the policy is plain and unambiguous, and permits of no interpretation or construction other than to give the words used their usual and ordinary meaning."

Seattle Dodge Service Co. v. Royal Ins. Co., 238 P. 568 (1925), 135 Wash. 524.

"The purpose of the Insurance contract should be considered. If the contract is fairly susceptible of two different conclusions, the one which is most favorable to the assured will be adopted. *Jack v. Standard Marine Ins. Co.*, 33 Wn. (2d) 265, 205 P. (2d) 351, 8 ALR (2d) 1426. Where a clause in an insurance policy is ambiguous, the meaning and construction most favorable to the insured must be applied, even though the insurer may have intended another meaning. (Case cited) But the rule that an insurance policy must be construed strictly against the company and liberally in favor of those afforded protection by it, has no application where the provisions of the policy are neither ambiguous nor difficult of comprehension. (Cases cited) And a court is not at liberty to revise a contract under the theory of construing it. (Case cited)."

Jeffries v. Gen. Cas. Co. of Am., 46 Wn. (2d) 543, 283 P. (2d) 128, (1955).

The decision of this Court does not specifically refer to any language contained within the definition of a hospital as being doubtful, uncertain or ambiguous. As indicated earlier, the only word or phrase contained in the definition of a hospital which appears to have been liberally construed by the Court was "has". If such be the case, the Court disregarded the plain and explicit meaning of the word "has" and in effect substituted therefor either the words "has available" or "furnishes".

The word "has" is the third person singular of the present indicative of have. 39 *Corpus Juris Secundum*, pp. 781-782. "Have" is the derivative root and the definition contained in the policy could be rephrased without affecting its meaning so as to have read as follows:

"The word 'hospital' whenever used in this policy means institutions which have a laboratory, x-ray equipment and an operating room where major surgical operations may be performed . . ."

The word "have" is defined by *Funk & Wagnalls' New Standard Dictionary of the English Language*, 1922 Edition, as follows:

"To hold as owner, possessor, occupier, or controller; be in possession or control of; own, possess; . . ."

The dictionary definition has been cited by the Louisiana Courts in *Creech v. Errington*, 207 La. 615, 21 So. (2d) 761, where the Court adopted the language set out in *Webster's New International Dictionary*:

"Have. to hold in possession or control; to hold as property; to own; as he *has* a farm." (Emphasis supplied)

Likewise, in a recent North Carolina decision, *Sabine v. Gill*, 229 N.C. 599, 51 SE (2d) 1, the Court stated:

"The word 'have' . . . is pertinently defined in the dictionaries as meaning 'to hold in possession or control; to hold as property; to own,' Webster; 'to hold or possess in ownership; to own,' Century. 'And it has been used immemorially to denote the ultimate in possession, control or ownership, to possess corporally,' Black's Law Dictionary."

The following cases construing the word "have" clearly indicate that it implies ownership or the state of possession. "Have" has been held to be synonymous with the word "keep". See *Stewart v. Commonwealth*, 270 S.W. 718; *State v. Harwi*, 230 Pac. 331; *Mangan v. Howard*, 238 Mass. 1, 130 N.E. 76. "Have" has been construed to mean to hold in possession or to control or to own. See *Smith v. State*, 277 S.W. 530; *Boykin v. State*, 129 So. 491; *U. S. v. Ninety-Nine Diamonds*, 139 F. 961, (CCA —8th); *Busteed v. Cambridge Savings Bank*, 306 Mass. 9, 26 N.E. (2d) 983. "Have" has been treated as being synonymous with ownership and, particularly when applied to property, it implies ownership. See *Chicago Home for Girls v. Carr*, 300 Ill. 478, 133 N.E. 344; *U. S. v. Ninety-Nine Diamonds*, *supra*.

That the definition of a hospital contained within the insurance agreements contemplated possession and ownership and the incidence thereof, control and supervision, is further demonstrated by the definition of the word "institution". Institution is defined by *Funk & Wagnall's New Standard Dictionary of the English Language*, 1922 Edition, as follows:

"Institution. That which is instituted or established; . . . a corporate body or establishment instituted and organized for public use, . . ."

The synonym of "institution", "establishment" is defined as a body of persons composing a business organization or private institution, together with the premises they occupy. As is thus apparent, the use of the term "institution" implies an established organization including not only certain facilities and a staff but supervision over the same as an integrated whole.

The word "has" is neither ambiguous, uncertain or doubtful in its meaning and its construction has been the subject of judicial interpretation on numerous occasions. Likewise, the various dictionary definitions are clear and explicit. In the absence of a finding of ambiguity, the rule of liberal construction invoked by the court is inappropriate. The word "has" must be accorded its plain and ordinary meaning and since its meaning is plain and unambiguous, there is nothing to interpret or construe and the Court erred in invoking the rule of liberal construction.

That portion of the hospital definition relating to medical supervision was the subject of judicial interpretation in *McKinney v. American Security Life Ins. Co.*, 76 So. (2d) 630. It is a recognized principle of insurance contract construction that the rule of liberal construction has no application where the particular language has acquired by judicial interpretation a clear and definite meaning. *Davis v. Combined Insurance Co. of America*, 70 S.E. (2d) 814; 44 C.J.S. Sec. 297, p. 1192, Note 14.

Wherefore, Appellant respectfully submits that this Honorable Court erred in invoking the rule of liberal construction, in the absence of a finding, that the particular language contained in the hospital definition was either ambiguous or difficult of comprehension and Appellant petitions for a rehearing of the appeal in the above entitled cause or in the alternative for a hearing en banc.

Respectfully submitted,

PAINE, LOWE, COFFIN AND HERMAN

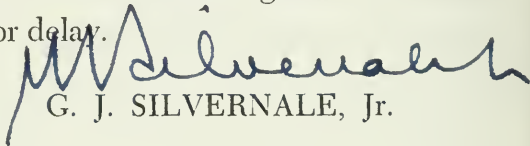
By G. J. SILVERNALE, Jr.

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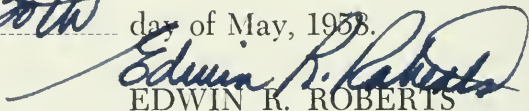
STATE OF WASHINGTON }
 County of Spokane } ss.

G. J. SILVERNALE, JR., being first duly sworn, on oath certifies and says:

That he is one of the attorneys for appellants in this cause; that he makes this certificate in compliance with Rule 23 of the rules of this Court; that in his judgment the within and foregoing Petition for Rehearing is well founded and is not interposed for delay.


 G. J. SILVERNALE, Jr.

SUBSCRIBED AND SWORN to before me at Spokane,
 Washington, this 20th day of May, 1938.


 EDWIN R. ROBERTS

Notary Public in and for the State
 of Washington, residing at Spokane.

IN THE
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Appellee.

No. 15721

FILED

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Appellee's Brief

PAUL P. O'BRIEN, CLERK

*On Appeal from the District Court of
the United States for the Eastern
District of Washington*

FIELDING H. FICKLEN
Spokane, Washington
Attorney for Appellee



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JURISDICTION

The jurisdiction of this court as set out in pages 1 and 2 of appellant's brief are correct.

ABSTRACT OF FACTS
PLEADINGS

The case was tried on Plaintiff's Complaint (R. 7), Supplemental Complaint (R. 13), Trial Amendment (R. 25), Defendant's Answer (R. 15), Plaintiff's Reply to Defendant's Affirmative Defenses (R. 23), Trial Amendment in open court (R. 48-49), and the announcement that the Answer of the defendant applied to the Trial Amendment (R. 48-49). The plaintiff through her son and guardian, Donald E. Marr alleged in two causes of actions, the issuance by defendant of two policies No. J448274 and A448274 on May 4, 1954, and their good standing at all times material (R. 7-11). That on January 29, 1956, she suffered a cerebral hemorrhage and was placed in the Jane O'Brien Hospital, Spokane, Washington, on said date and was at all times thereafter, up to and including date of trial, April 19, 1957, a patient therein; (R. 8) that under defendant's insuring agreement No. J-448274 plaintiff was entitled to pay for hospitalization expenses incurred for a 240-day period commencing January 29, 1956, and ending September 24, 1956, at the daily rate of \$12.00 or a total of \$2,880.00; (R. 8, 9, 13, 25, 26) and that under defendant's agreement No. A-448274, plaintiff was entitled to pay for hospitalization expenses incurred for a 100-day period commencing

September 24, 1956, and ending January 2, 1957, at the daily rate of \$8.00 or a total of \$800.00 (R. 10, 11, 14, 26).

By its answer defendant admitted the issuance of said policies and their good standing at all times material, and denied all allegations of any benefits thereunder accruing to the plaintiff (R. 15, 16). The balance of Abstract and Pleadings in last paragraph on page 3 of appellant's brief correctly states a summary of defendant's affirmative pleading.

EVIDENCE

Mary I. Marr, the Plaintiff, took out two policies with the Reserve Life Insurance Company, the defendant, on May 4, 1954, which policies were always in good standing at all times mentioned in the evidence. On January 29, 1956, plaintiff had a cerebral hemorrhage, also described as a slight stroke (R. 141, 142, 148). On the recommendation of plaintiff's doctor, Winston Rowe, and her son's physician, Dr. Max Rodney, plaintiff was taken on January 29, 1956, to the Jane O'Brien Hospital in Spokane, Washington. At this time she had a weakness of her right arm and right leg, and was unable to care for herself or feed herself and did not recognize her son. She required medicine to keep her blood pressure under control, a cerebral stimulant, cathartics and general nursing care (R. 142, 143). Later her condition improved and she was able to get out of bed and walk with some help and assistance, but did not have the full use of her right hand and her mental situ-

ation was not entirely clear as she had a type of aphasia. Dr. Rowe testified that she was sick in the general sense of the term from January 29, 1956, continuously and was still in that condition at the date of the trial of April 19, 1957. On Dr. Rowe's last visit the 1st of April, 1957, she she was still taking medicine for blood pressure and a cerebral stimulant and was given general nursing care (R. 143). Witness Dorothy Blage (R. 106) testified that it had only been in the last six months before April 19, 1957, that the plaintiff was, with some assistance, at times able to feed herself.

Jane O'Brien Hospital of Spokane, Washington, for the last twelve or fourteen years has been licensed as either a nursing home or a psychiatric hospital. When Plaintiff entered on January 29, 1956, Jane O'Brien Hospital was licensed by the State Department of Health of the State of Washington as a nursing home and in June, 1956, Mr. Canwell, the present administrator for Havens, Inc., received a license for a psychiatric hospital from the State of Washington, Department of Health, and Jane O'Brien Hospital has so operated since June of 1956. The evidence showed that for approximately five years prior to 1956, that Jane O'Brien Hospital had been licensed as a psychiatric hospital and that the owner, Mrs. O'Brien, voluntarily asked the State Department to change the license to that of a nursing home. The evidence showed that there was no substantial change in the operating procedure when it was licensed as a nursing home and when it was licensed

as a psychiatric hospital. At both times approximately 55 to 60 patients would be in the hospital which has a licensed bed capacity of 61. Jane O'Brien Hospital has never been licensed as a general hospital under the Revised Code of Washington 70.41 Hospital Licensing and Regulations, Chap. 267, Laws of 1955 (R. 92), new legislation first effective in 1955.

John Canwell, one of the owners of Jane O'Brien Hospital, purchased an interest on March 1, 1956. Jane O'Brien Hospital is managed by an experienced hospital man, John Canwell. This witness testified that Jane O'Brien Hospital has been a recognized hospital in the Spokane area for ten years (R. 74). This manager-administrator of Jane O'Brien Hospital has had premedical experience, two years of medicine at St. Louis University and eight years as a hospital management consultant. For eight years he was Vice President of Northwest Hospital Consultants, a hospital managing firm, managing the Prosser Hospital, Kennewick Hospital, Lake Chelan Hospital, (in the State of Washington) St. Joseph Hospital in Montana, Bonner County Hospital at Sandpoint, Idaho (R. 61-73). John Canwell is also business manager for Physicians' Clinical Laboratories, owned by Dr. Oscar Christenson, a medical doctor, (R. 61) and also the pathologist for St. Luke's Hospital in Spokane (R. 62). Jane O'Brien Hospital at all times pertinent to this case had a laboratory, x-ray equipment, permanent and full time facilities for the care of over night resident patients, each of which was under the supervision of the licensed doctor of medi-

cine and had a graduate registered nurse always on duty, with hospital charts for each patient. Jane O'Brien Hospital had an arrangement with Sacred Heart Hospital, a block and a half away, where any surgery on their patients may be performed, but did not have a room for major surgery in the Jane O'Brien Hospital itself. Jane O'Brien Hospital is a hospital with 40 rooms and with 61 beds (R. 77, 78, 79). It houses acutely ill, post-operative cases, orthopedic cases, the aged and on several occasions have had children there, pediatric cases (R. 80). The x-ray pictures that are taken at the hospital are turned over to a qualified radiologist at the direction of the physician for interpretation (R. 80, 81). The administrator of the hospital is professionally responsible to the medical doctors of the patients (R. 88), and that while a laboratory is maintained at the hospital, the samples of blood and various tests are generally sent out to Dr. Oscar Christenson for analysis and handling.

That the defendant has paid a claim on a patient at Jane O'Brien Hospital in 1954-1955. A patient by the name of James Reigart was at Jane O'Brien Hospital and a claim was filed in the amount of \$908.43 with the defendant Reserve Life Insurance Company under one of its hospital policies and this claim was paid by the Reserve Life Insurance Company. That policy did not have the same definition of a hospital in it that the present policy does, but Jane O'Brien Hospital was recognized at that time by the Reserve Life Insurance Company as a hospital (R. 109-115).

SUMMARY OF ARGUMENT

The policies of the Reserve Life Ins. Co. taken out by Mary I. Marr to provide for hospital expenses are the type of insurance contracts that are entitled to broad, liberal interpretation so that the dominant beneficent purposes of the contracts will not be avoided. The contracts do not specifically exclude a psychiatric hospital, nor is it stated in either that the policies are only valid if the insured is necessarily confined in a general hospital, and again there is no requirement that the recognized hospital must have all the criteria to be a member of the American Association of Hospitals.

The District Court having made its Findings of Fact, Conclusions of Law, and Judgment after hearing the evidence rightly held that there had been substantial performance by the Jane O'Brien Hospital of the terms of the policies and that Plaintiff was entitled to recover. On this appeal this Court by its decision and those of other jurisdictions must consider all the evidence in the most favorable light for the appellee, and must affirm unless the decision of the United States District Court was clearly erroneous. It is on this basis rather than the position taken by the appellant in its Synopsis of Argument and its Argument that appellee respectfully believes this Court must consider this appeal.

ARGUMENT

While the number of cases construing hospitalization policies is rather limited, they hold that the pro-

visions should be interpreted liberally to the end that equity be done and that the underlying beneficent purposes of the contract be not rendered nugatory. In Vol. I of Appleman, Insurance Law and Practice Section 705—Disability and Specific Loss. This text says:

“Where there is any ambiguity as to hospital benefits recoverable, a rather liberal construction will be taken to afford protection to the insured.”

This text cites in note 27 the case of *Colorado Life Co. v. Polk*, 83 S. W. (2d) 534, and under this section in the Pocket Supplement to Vol. I, Appleman Insurance Law and Practice is cited the case of *McKinney v. American Security Life Ins. Co.*, 76 So. (2d) 630; La. App. 1954, and the case of *Hesse v. U. S. Fidelity & G. Co.*, 21 P. (2d) 1090, 143 Ore 700.

This same rule of construction is set out in the case of *Borglund v. World Ins. Co.*, a Supreme Court of Oregon case decided September, 1957, in 315 P. (2d) 158, the Court held in this disability benefit insurance case where the plaintiff insured lost a leg above the knee that he was not confined to that part of the policy making a specific award for loss of a foot, but was entitled to recover under a general clause granting monthly indemnity for insured wholly and continuously disabled by injury not resulting in a specific loss as detailed in the policy. Under Pacific Reporter key number Insurance 146 (1) the policy should be construed according to its character and its beneficent purposes in which the insured had sup-

posed it was understood and this Oregon case quotes with approval from the *National Life & Accident Ins. Co. v. Davies*, 34 Ala. Appeals 290, 39 So. (2d) 647, 700. Certiorari denied 252 Ala. 107, 39 So. (2d) 703. The Court said:

“The policy should be construed according to its character and its beneficent purposes, and in the sense in which the insured had reason to suppose it was understood. It is not a question of what the words contained in the contract literally or figuratively mean, but instead what was their intended meaning when taken in connection with their use in the instrument.”

And in *Manhein v. N. Y. Life Ins. Co.*, a La. App. case 1941, 5 So. (2d) 918, it was held that provisions in a life, health and accident policy should be given a liberal interpretation to the end that equity be done and that the underlying beneficent purposes of the contract not be rendered nugatory.

This rule of interpretation and construction has been followed in the case of *McKinney v. American Security Life Ins. Co.*, La. App. 1954, 76 So. (2d) 630, which construed and interpreted a definition of a hospital in the exact wording of the definition in the Reserve Life policies issued to Mary I. Marr. And in that case the facts were very analogous to the facts in the instant case. In the *McKinney* case the patient was necessarily confined for twelve days at McDonald Clinic which did not have x-ray equipment although the same was readily available through another doctor in a nearby town on a contract, and had a regis-

tered nurse only in the day time and a practical nurse at night, and otherwise the Clinic met all the requirements of the definition of a hospital in the policy. The Court said:

“The intention of the parties is of paramount importance and must be determined in accordance with plain, ordinary and popular sense of the language used in the agreement and by giving consideration on a practical, reasonable and fair basis to the instrument in its entirety.”

Citing the case of *Beard v. Peoples Life Ind. Life Ins. Co.*, 5 So. (2d) 340, and citing *Manhein v. N. Y. Life Ins. Co.*, 5 So (2d) 918. In the *McKinney* case the Court said it could not see how the insurance company was injured by the clinic having its x-ray work done in another town under contract. In the instant case the Jane O'Brien Hospital had a contractual arrangement with the Sacred Heart Hospital a block and a half away where any necessary major surgery could be done and in the language of the Louisiana Court I cannot see how the Reserve Life Ins. Co. was harmed by the Jane O'Brien Hospital using Sacred Heart surgery facilities rather than having its own room for surgery. *McKinney v. American Security Life Co.* is cited in the case of *Seguin v. Continental Service Life and Health Ins. Co.*, 89 So. (2d) 113, 230 La. 533; 55 A.L.R. (2d) 1014, a Supreme Court of Louisiana decision dated June 11, 1956, overruling 83 So. (2d) 789, where the *McKinney* case is cited in the dissenting opinion. Also cited with approval is *Beard v. Peoples Ind. Life Ins. Co. of La.*, 5 So. (2d) 340,

342. The citation of the *McKinney* case in the *Seguin* case is found on page 115 of 89 So. (2d) The case of *McKinney v. American Security Life Ins. Co.*, 76 So. (2d) 630, La. App. 1954, is quoted with approval in the case of *Pipes v. World Ins. Co. of Omaha*, reported in 150 Fed. Sup. 370, U. S. Dist. Ct. West. Dist. of La., decided on March 28, 1957, involves an action to recover disability benefits for sickness on a health and accident policy. In the 12th and 13th head notes on page 380 of 150 Fed. Sup. the Court said:

“Louisiana Courts, in keeping with the teachings of our Civil Code (and the rule prevailing in all other jurisdictions, so far as we know) unfailing have held that, in cases of ambiguity in an insurance contract, any doubts as to the meaning of ambiguous words should be resolved against the insurer, and in favor of the insured. Provisions in a policy such as this should be given a broad, liberal interpretation so that the dominant, beneficent purposes of the contract will not be avoided where the doubts as to coverages, if such exist, were created by the insurer in drafting the terms of the policy.”

On page 381 of 150 Fed. Sup. following the above quotation from the *Pipes* case there is this note, note (10),

“*McKinney v. American Security Life Insurance Company*, Louisiana Appeals, 76 So. (2d) 630, 633, * * * The intention of the parties is of paramount importance and must be determined in accordance with plain, ordinary and popular sense of the language used in the agreement and

by giving consideration on a practical, reasonable and fair basis to the instrument in its entirety.”

Citing *Beard v. Peoples Ind. Life Ins. Co.*, 5 So. (2d) 340.

The Reserve Life policies taken out by Mary I. Marr are clearly distinguishable from the wording in the policy in the case of *Rew v. Beneficial Standard Life Ins. Co.*, 41 Wn. (2d) 577, 250 P. (2d) 956, 35 A. L. R. (2d) 891, as in the *Rew* case the wording was as follows:

“The word hospital as used in this policy shall not include a rest, convalescent or nursing home.”

In the *Rew* case there was specific exclusion of convalescent and rest homes and when the undisputed evidence showed that the insured was at the Valley View Convalescent Home, which was a convalescent home, both in name and in actuality, and was therefore excluded from the terms of the policy, and lower Court which had construed it as being a hospital under the terms of the policy was reversed. There is an annotation to this case in 35 A. L. R. (2d) 897 and that annotation with the A. L. R. Supp. Service gives most of the cases set out in Appellee’s Brief. The Reserve policies, No. J and A taken out by Mary I. Marr have no such exclusion for psychiatric hospitals. In these Reserve policies the term “recognized hospital” is used and in the J policy on page 3 a definition of the word “hospital” is given and for this reason this case differs from the holding of the Supreme Court of Washington in the *Rew v. Beneficial Standard Life Ins. Co.* case.

And as the learned Judge in the District Court said in his oral opinion (R. 159):

“Here it strikes me that, while the specific definitions are put in these policies, the company has not limited the hospital services to general hospitals and they have not limited it to hospitals certified by or accredited by any national association of hospitals or by an association of doctors; it is simply hospital and then with the definition that is added in the policies.”

And the District Court went on to say in its oral opinion:

“I also feel that it wasn't the intent of these parties, and it is not justified by the language of the policies, to say that the service was to be limited to the larger hospitals in any particular city. I can't conceive that even if a person lived in Spokane and purchased one of these policies that the policy might cover the hospitalization in Cheney or Davenport, but wouldn't cover the hospitalization in the identical type of institution in Spokane. I think that the policy has to be construed as referring to small towns and to cities equally here, and it is my view that there has been substantial compliance with the definitions as contained in the policy.”

The Court will note that most of Appellant's evidence and most of Appellant's argument seems to be based on the theory that Plaintiff in the District Court had to prove that Jane O'Brien Hospital was a general hospital and had all of the necessary services and facilities that are required for membership in the American Association of Hospitals or the American Medical Association approved or certified hospitals.

If there were some wording in the policies under construction that would warrant such evidence or require it then this argument and this evidence of Appellant would be more pertinent and appropriate to this case.

The next few paragraphs will be devoted to replying to the cases cited by Appellant in his Brief.

American Ins. Co. of Tex. v. Brown, 222 P. (2d) 757; 203 Okla. 407 is a case involving a health and accident insurance policy and does hold that the insured must bring himself within the conditions of the policy in order to recover thereon, but it goes on to hold that a clause in a health insurance policy requiring that the disease from which the insured suffers originate over thirty days after the date of the policy to be within the coverage thereof, is strictly construed against the insurer and insured's illness or disability will be deemed to have its inception when the disease first becomes manifest or active or when distinct symptoms or conditions from which a physician can diagnose the disease with reasonable accuracy, exist. A jury verdict for the Plaintiff was affirmed by the Supreme Court of Oklahoma.

The case of *Cosgrove v. National Cas. Co.*, 177 Wash. 211; 31 P. (2d) 80, was an accident insurance policy with a clause excluding death on the public highway and the evidence showed that death was on the public highway and the insured was not allowed to recover. This case is comparable in its holding, to a certain extent, to the case of *Rew v. Beneficial Standard Life Ins. Co.*, 41 Wn. (2d) 577; 250 P. (2d) 956, previously referred to in this Brief.

The case of *Evans v. Metropolitan Life Ins. Co.*, 26 Wn. (2d) 594; 174 P. (2d) 961, is a case involving a life insurance policy and the case of *Green v. National Cas. Co.*, 87 Wash. 237; 151 P. 509, involves an accident which policy provided that if the insured got into a more hazardous occupation then the recovery should be less and the facts showed he did get into a more hazardous occupation.

The case of *Hamilton Trucking Service v. Automobile Ins. Co.*, 39 Wn. (2d) 688; 237 P. (2d) 781 and the case *Handley v. Oakley*, 10 Wn. (2d) 396; 116 P. (2d) 833 neither seem to have any particular application to the present case of *Reserve Life Ins. Co. v. Marr*.

The case of *Hesse v. U. S. Fidelity & G. Co.*, 21 P. (2d) 1090; 143 Ore. 700, is simply a case holding that there is no coverage under hospitalization policies after insured was transferred from a hospital to a home and appears to have no influence on the present case other than its rule of liberal construction which is quoted by Appellee in his argument.

Hospital Service Co. of Alabama v. Eubanks, 55 So. (2d) 755; 36 Ala. App. 338 is correctly quoted in Appellant's Brief and where the policy provided payments would be made only to bed-patients and the undisputed evidence showed that the insured stuck something in his foot and was treated as an out-patient and never as a bed-patient, it was rightly held that the policy did not apply to him and there could be no recovery.

The quotation on page 17 of Appellant's Brief from *Issacson Iron Works v. Ocean Acc. Ins. Corp.*, 191 Wash. 221; 70 P. (2d) 1026, stops in the middle of a sentence at a semi-colon. The complete quotation is,

“The burden rested upon the respondents to show the loss which it suffered comes within the terms of the policy; while, on the other hand if the policy be ambiguous, such ambiguity should be construed in favor of the insured.”

Kronstat v. Ass. Hospital Serv., 78 N. Y. S. (2d) 816 cited by Appellant is a case where the insurance policy, a hospital policy, had a provision requiring insured to be a registered bed-patient at a hospital and excluded the benefits while insured stayed at a boarding house, while under the treatment of a doctor.

Appellant on page 29 of his Brief refers to the case of *Kinney v. Am. Serv. Life Ins. Co.*, 76 So. (2d) 630, La. 1954. This case is correctly designated *McKinney v. American Security Life Ins. Co.*, 76 So. (2d) 630. Appellant tries to distinguish the facts of that case from the facts in the instant case, and although there are some differences they are not as stated by Appellant in his Brief. In the *McKinney* case the x-ray services, both the pictures and the interpretation, were done for the MacDonald Clinic at another town nearby, and there was the additional failure to comply strictly with the definition in the policy in that there was not a registered nurse on duty at all times, although there was a registered nurse in the day time and a practical nurse on duty at night. In the instant case surgery was available

at Sacred Heart Hospital a block and a half away, and is a similar situation to that of the x-ray pictures being taken and interpreted in another town rather than at the MacDonald Clinic in the *McKinney* case. However, the Jane O'Brien Hospital at Spokane, Washington, does have a registered nurse on duty at all times and in that respect the facts differed from the *McKinney* case, but the *McKinney* case construed a definition of a hospital identical to that contained in the two policies now under consideration. Certainly the hospital facilities at Jane O'Brien Hospital were at least equal to if not superior to those in the *McKinney* case and the Louisiana Court held that under the liberal interpretation of such hospital policies and the substantial performance that the Plaintiff was entitled to recover and that the institution was a hospital as defined in the policy, considering the policy as a whole.

On page 29 of Appellant's Brief he again brings in the argument that this MacDonald Clinic in the *McKinney* case was considered and recognized as a general hospital in its area, whereas there was nothing in the *McKinney* case and nothing in the Reserve policies that said that either hospital had to be considered as a general hospital.

The case of *McNichols v. Denver*, 209 P. (2d) 910; 120 Col. 380, a Colorado case, defines a hospital.

In the case of *Miller v. Penn Mutual Life Ins. Co.*, 189 Wash. 269; 64 P. (2d) 1050, where that particular set of facts is applicable then the law as stated in the *Miller* case is correct.

It can be argued that there is ambiguity in the Reserve Life policy No. J448274, in as much as on the first page of the policy, the front of the policy, the following language is used,

“If the insured * * * shall be necessarily confined within a recognized hospital”

And on page 3, paragraph 10 in the inside of the policy, the insurer defines the word “hospital” to mean an institution with certain facilities, whereas the term “recognized hospital” has been interpreted in several cases. It is not clearly apparent from the wording of Reserve policy whether the insured means that the word “hospital,” the single word, is to be given a different definition from the two words “recognized hospital” on page 1 of the contract. This is more readily seen if there is a comparison of policy No. A448274 of the Reserve Life Ins. Co. as taken out by Mary I. Marr, where the following language is used in policy A,

“If the insured * * * shall be necessarily confined within a recognized hospital (as defined in part 2 hereof)*, the company will pay the insured for the hospital, room expense * * *.”

In the A policy the definition does refer to recognized hospital, whereas in the J policy it is not clear whether the term “recognized hospital” is defined or whether just the plain term “hospital” is defined.

The case of *Miner v. Benefit Ass'n Railway Employees*, 218 P. (2d) 244; 169 Kan. 199, is a case in-

volving insured's fraud in filling out an application for an insurance policy and thus does not seem to have any particular bearing or authority in this Brief.

National Bankers Life Ins. Co. v. Hornbeak, 226 S. W. (2d) 228; Tex. Civ. App. 1954, was a case involving a Dallas, Texas, hospital which was issued a license as a hospital under City Ordinances of Dallas, although it did not have any surgery, x-ray facilities or laboratory facilities, but the Court held that in the general sense of the word, and because the policy did not define what was meant by the word "hospital" or the words "recognized hospital" that this would be considered a "recognized hospital" and the insured was allowed to recover. In this Texas case the Dallas hospital was considered a "recognized hospital" even though its facilities were very much more inadequate than those of Jane O'Brien Hospital in Spokane, Washington. This case does show what can be considered a recognized hospital in Texas, the home state of the Appellant Insurance Company.

With the definition of a hospital in the Reserve Life policies this case apparently would be less controlling than the case of *McKinney v. Am. Sec. Life Ins. Co.*, 76 So. (2d) 630; La. App. Both the hospital in the *McKinney* case and the Jane O'Brien Hospital in the *Marr v. Reserve Life Ins.* case were equipped to offer services superior to that of the Dallas hospital in the *Hornbeak* case, just referred to, 266 S. W. (2d) 228 (Texas 1954).

Old Line Mutual Ins. v. Tilger, 264 S. W. (2d) 557, is a Texas case cited in Appellant's Brief for the proposition that the burden of proof was upon the insured to prove the happening of an event provided for in the policy. While this is true in a general way the case also holds that after the fundamentals of the policy have been proved by the Plaintiff that the burden is upon the Defendant to prove any limitation or exclusions in the policy. I believe in the instant case, that the definition of a hospital are limitations on the words "recognized hospital" on page 1 of Reserve policy J and that the burden would be on the insurance company to prove that the hospital in question, the Jane O'Brien Hospital, did not come within the definition of a hospital set out on page 3 of the J policy and on page 1 of the A policy taken out by Mary I. Marr in May, 1954.

The case of *Parker v. Rash*, 236 S. W. (2d) 687; 314 Ky. 609, is a Kentucky case involving zoning and holds that doctor's office building with treatment rooms and x-ray room, that was proposed to be built was not a hospital.

The case of *Rew v. Beneficial Standard Life Ins. Co.*, 41 Wn. (2d) 577; 250 P. (2d) 956; 35 A. L. R. (2d) 891, has already been discussed to some extent in Appellee's Brief. While this case does have a bit of obiter dictum from the trial Judge that the policy did not have a definition of a hospital, the Supreme Court of Washington decided the case on the basis of a positive and specific exclusion of convalescent and resting homes from the terms of the policy, and

not on what the trial Court said. This *Rew* case does not hold that where the policy defines what is considered a hospital that strict and literal proof of those conditions are necessary for the recovery of the insured. This seems to be Appellant's position in argument, both in the District Court and in the Circuit Court of Appeals here.

Richards v. Metropolitan Life Ins. Co., 184 Wash. 595; 55 P. (2d) 1067, involves a life insurance policy and the provisions from the case are correctly quoted by the Appellant in its Brief, but the case seems to add very little to the law applicable to the facts of the instant case.

The case of *Ross v. First American Ins. Co.*, 250 N. W. 75; 125 Neb. 329, is a Nebraska case decided in 1933, correctly stated in Appellant's Brief that where the policy specified that treatment had to be in an incorporated hospital and insured was taken to a small unincorporated hospital, that he was not entitled to hospital expenses because the class of hospital specifically specified in the policy was not attended by the insured while he was ill. Although the case holds that there was some reason for making the distinction since incorporated hospitals might be more stable and stronger, a check through Shepard's Cita-tor for Northwestern Reporter System indicates no other case where this particular head note part of the *Ross* case has ever been quoted again, and apparently this is the only case so holding.

In *Starr v. Aetna Life Insurance Co.*, 41 Wash. 199;

83 P. 113, the general proposition set out in Appellant's Brief on page 17, is supported by this case; however, beginning at the bottom of pages 203 of 41 Wash. in the *Starr* case, the Court said:

“It is the established and universal law that insurance policies are to be construed in favor of the insured, and most strongly against insurance companies.

“This is a reasonable rule, considering the fact that these policies are prepared by men who are learned in the law and trained in preparing contracts of this kind, and who have studied the legal effects of all the multifarious provisions in the ordinary insurance policies, whether accident or life; while the insured are frequently men and women of limited understanding, of simple methods of thought, and who, as a rule, would not be capable of technically construing doubtful provisions in a contract. Speaking of this proposition, it was said by the supreme court of Alabama, in *Equitable Accident Ins. Co. v. Osborn*, 90 Ala, 201, 9 South. 869, 13 L. R. A. 267:

“‘Exceptions of this kind are construed most strongly against the insurer, and liberally in favor of the insured. This is now the settled rule for construing all kinds of insurance policies, rendered necessary, especially in modern times, to circumvent the ingenuity of the insurance companies in so framing contracts of this kind as to make the exceptions unfairly devour the whole policy.’”

The District Court has found that there was substantial performance even under the definition of a hospital in Reserve Life Ins. policies issued to Mary I. Marr. In *Am. Jur.*, Vol. 12, page 900, Section

343C, entitled Substantial Performance and under section 343 generally, it says:

“As stated above there is considerable authority as in support of the rule that a party must fully perform the stipulations on his part before the other party is obligated to perform, unless the promises are independent. A more liberal rule is, however, supported by much authority and the trend is toward this latter rule. Thus, it is said that the law looks to the spirit of the contract and not the letter of it, and that the question therefore is not whether a party has literally complied with it, but whether he has substantially done so. Similarly, other courts state that substantial, and not exact performance accompanied by good faith is all the law requires in the case of any contract to entitle the party to recover on it.”

Citing the following cases—*Woodruff v. Hough*, 91 U. S. 596, 23 L. ed. 332; *Newport v. Newport & C. Bridge Co.*, 90 Ky. 193, 13 S. W. 720, 8 L. R. A. 484 and *Porter v. Trader Ins. Co.*, 164 N. Y. 504, 58 N. E. 641, 52 L. R. A. 424, and the following cases cited in the pocket supplement to the same citation in 12 Am. Jur. on Contracts, Section 343, *Ambassador Bldg. Corp. v. St. Louis Amsterdam Theatre*, 238 Miss. App. 600, 185 S. W. (2d) 827, *Cracchiolo v. Carlucci*, 62 Ariz. 284, 157 P. (2d) 352, *Lautenbach v. Meredith*, 240 Iowa 166, 35 N. W. (2d) 870; *Winfield Mutual Housing Corp. v. Middlesex Concrete Products & Excavating Corp.*, 39 N. J. Super. 92, 120 A. (2d) 655 and *King v. Hintze*, 2 Utah (2d) 166, 270 P. (2d) 1095.

At the risk of citing cases already very familiar to this Court on the question of appeals from the United

States District Court to the Circuit Court of Appeals I believe that the following cases are pertinent besides numerous others: *Keller Products, Inc. v. Rubber Linings Corp.*, U. S. C. A. 7th Cir., 213 Fed. (2d) 382, 47 A. L. R. (2d) 1108. It was held on Appeal from the Federal District Court where the case was tried before the Court without a jury and judgment was based on the findings of the Court, that upon appeal from this judgment in an action for a trademark infringement and unfair competition in which the trial court found the issues in Plaintiff's favor, the Appellate Court is required to consider the evidence in the light most favorable to the Plaintiff. This same rule is true also where the appeal is based on a jury trial as set out in *Railway Express Agency c. Mackay*, U. S. Court of Appeals, 8th Cir., 181 Fed. (2d) 257, 19 A. L. R. (2d) 1284, also a number of cases cited under A. L. R. (2d) Series Digest, under Appeal and Error, Section 687, one of which is *Bryan v. Travelers Ins. Co.*, 8 A. L. R. (2d) 467, 32 Wn. (2d) 289, 201 P. (2d) 502, where the Court held a trial court's determination of factual issues will not be overturned on appeal unless Appellate Court is of the opinion that the preponderance of the evidence is against the Court's finding.

The case of *Ellis v. Brown*, 13 A. L. R. (2d) 945, 177 Fed. (2d) 667, holds a finding of fact by U. S. Dist. Ct. as binding on appeal to the United States Court of Appeals unless it is clearly erroneous.

Again in the *U. S. v. the First Sec. Bank of Utah*,

42 A. L. R. (2d) 951, 208 Fed. (2d) 424, the Court said:

“It is not the function of the Court on appeal to weight evidence or to draw inferences therefrom; it may not retry doubtful issues of fact and substitute its judgment for that of the trial court.”

Memorial Hospital Ass'n v. Pac. Great Products Co., 50 A. L. R. (2d) 442, 45 Cal. (2d) 634, 290 P. (2d) 481 can be summarized:

“The power of an appellate court with the respect to the sufficiency of the evidence to sustain the judgment is limited to the determination of whether there is any evidence, contradicted, or uncontradicted, which would support the judgment rendered, and all reasonable inferences must be indulged to uphold it, if possible.”

In the case of *Lassiter v. Atkinson Co.*, U. S. Court of Appeals, Ninth Circuit, decided August 24, 1949, reported in 176 Fed. (2d) 984, 21 A. L. R. (2d) 1313, it was held that the Appellate Court is prohibited under Rule 52A of the Federal Rules of Civil Procedure from setting aside the trial court's finding of fact, unless it is clearly erroneous, but if on the entire evidence, the Appellate Court was left with a definite and firm conviction that a mistake had been committed, it has the duty of reversing the trial court's findings, but the Appellate Court will not set aside the findings of the trial court if the Appellate Court is satisfied that the proof before the trial court was sufficient to warrant the trial court's inference and it cannot be said that the trial court's finding is clearly erroneous.

CONCLUSION

Jane O'Brien Hospital has been recognized as a hospital by the State of Washington, by the area it serves, and by the Appellant in 1955 when it paid the Reigart claim under Appellant's then hospital policy.

I respectfully submit that the Findings of Fact and Conclusions of Law, and Judgment of the Trial Court were supported by sufficient evidence and correctly construed the policies of insurance, and that the Judgment of the Trial Court should be affirmed and that Appellee receive its costs incurred on this appeal.

Respectfully submitted,

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